

No. 11966

---

United States  
Circuit Court of Appeals  
for the Ninth Circuit

---

J. J. NEWBERRY COMPANY, a corporation,  
Appellant,

vs.

MERTON L. CRANDALL and ETTA  
CRANDALL, his wife,  
Appellees.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States for  
the District of Arizona

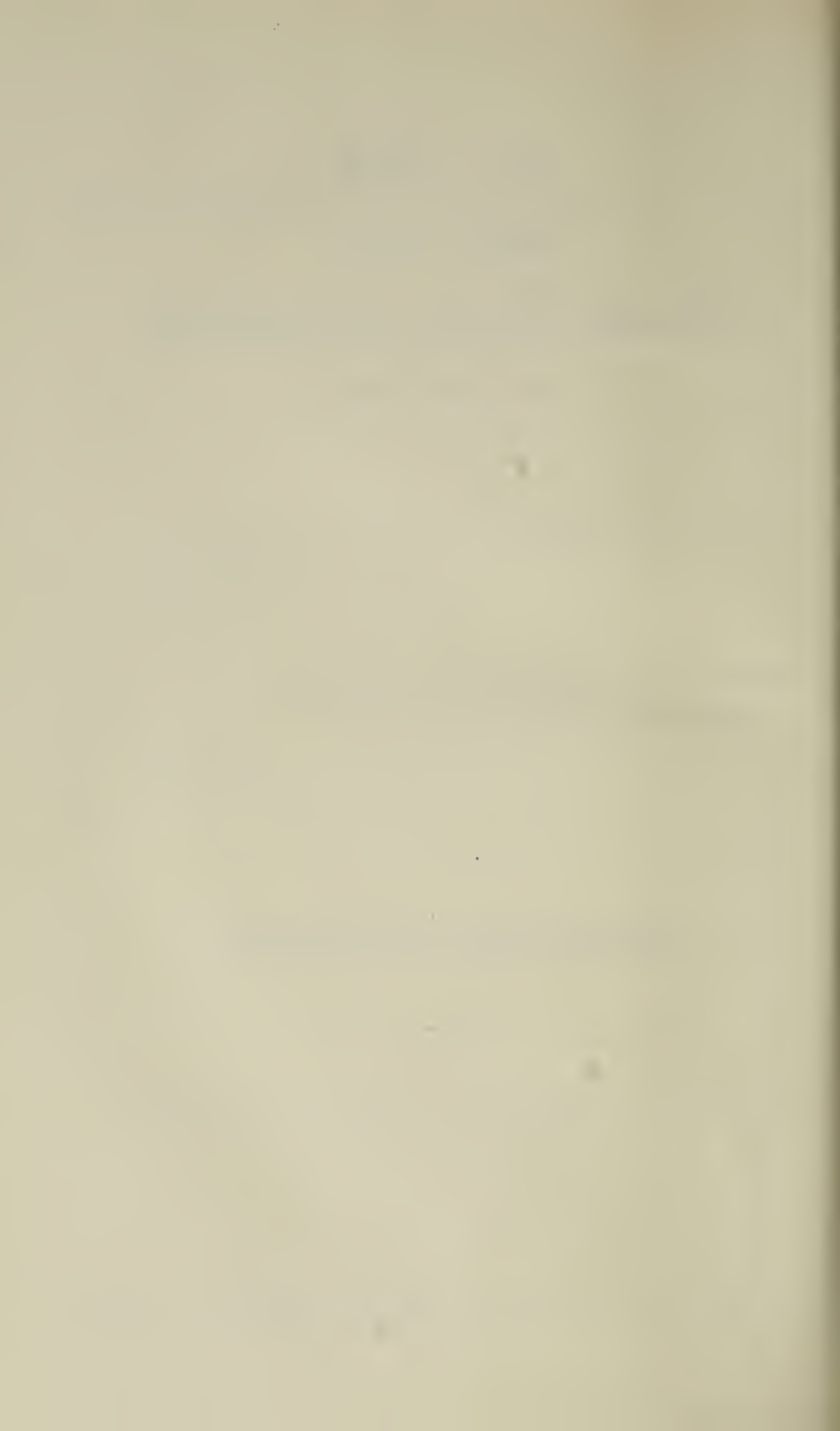
---

Typo Press, 398 Pacific, San Francisco

FILED

AUG 3 - 1948

PAUL P. O'BRIEN,



## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer .....	10
Appeal:	
Bond on .....	24
Certificate of Clerk to Transcript of Record	
on .....	29
Designation of Record on.....	27
Order for Transmittal of Original Exhibits	
and Reporter's Transcript on.....	27
Statement of Points and Designation of	
Record on .....	138
Bond on Appeal .....	24
Certificate of Clerk to Transcript of Record	
on Appeal .....	29
Clerk's Notation of Judgment in Civil Docket	20
Complaint .....	5
Designation of Record on Appeal (DC).....	27
Designation of Record, Statement of Points	
and (CCA) .....	138
Judgment .....	19
Minute Entries:	
June 27, 1947—Order Granting Motion to	
Strike .....	9
April 6, 1948—Trial .....	11
April 7, 1948—Trial .....	14

Minute Entries—(Contd.)	Page
April 12, 1948—Judgment .....	17
May 3, 1948—Order Denying Motion for New Trial .....	22
May 5, 1948—Order Remitting Excessive Amount of Judgment .....	23
Motion to Set Aside Verdict and Judgment, or, in the Alternative Motion for New Trial....	21
Names and Addresses of Attorneys of Record	1
Notice of Appeal .....	24
Order for Transmittal of Original Exhibits and Reporter's Transcript to Circuit Court of Appeals .....	27
Order Removing Cause to the United States District Court .....	4
Petition for Removal to Federal Court.....	2
Statement of Points and Designation of Rec- ord on Appeal (CCA).....	138
Transcript of Testimony.....	30
Witnesses for Defendant:	
Huffman, Charles C.	
—direct .....	99
—recall, redirect .....	116
—recross .....	117
Miller, Hugh John	
—direct .....	114
Scott, Joe	
—direct .....	102
—cross .....	108

## Transcript of Testimony—(Contd.)

## Witnesses for Plaintiffs:

Cohen, Matthew

—direct ..... 93

—cross ..... 96

Cooley, Donna May

—direct ..... 35

Cooley, Marie

—direct ..... 32

Crandall, Etta

—direct ..... 40

—recalled, direct ..... 91

—cross ..... 92

—rebuttal, direct ..... 119

—cross ..... 119

Crandall, Merton L.

—direct ..... 49

—cross ..... 71

—redirect ..... 85

Huffman, Charles C.

—direct ..... 38

Magnusson, Alvira

—rebuttal, direct ..... 120

—cross ..... 123

—redirect ..... 125

Verdict ..... 16



## ATTORNEYS OF RECORD

GUST, ROSENFELD, DIVELBESS,  
ROBINETTE & LINTON,  
328 Security Building,  
Phoenix, Arizona,  
Attorneys for Appellant.

BROWN & LANGERMAN,  
44 North 1st Avenue,  
Phoenix, Arizona,  
Attorneys for Appellees.

In the Superior Court of the State of Arizona in  
and for the County of Maricopa

Civ—1043 Phoenix

No. 57906—Div. 1

MERTON L. CRANDALL and ETTA

CRANDALL, his wife,

Plaintiffs,

vs.

J. J. NEWBERRY COMPANY, a corporation,  
Defendant.

### PETITION FOR REMOVAL TO FEDERAL COURT

The petition of J. J. Newberry Company, defendant in the above entitled cause, respectfully represents to this Honorable Court:

#### I.

That the above entitled action has been brought in this Court and the time within which the defendant is required to answer or otherwise plead has not yet expired.

#### II.

That said action is a suit of a civil nature.

#### III.

That the value of the matter in controversy in said action is in excess of Three Thousand (\$3,000.00) Dollars, as appears from the allegations of plaintiffs' complaint on file herein.



## IV.

Your petitioner shows to the court that the action aforesaid involved a controversy which is wholly between citizens of different states in that Merton L. Crandall and Etta Crandall, his wife, the plaintiffs in said action were, at the time of the commencement of said action in this court and still are citizens and residents of the State of Michigan and that your petitioner, J. J. Newberry Company, defendant, was at the time of the commencement of said action and still is a corporation chartered by and existing under and by virtue of the laws of the State of Delaware and having its place and principal place of business in the City of Wilmington, State of Delaware.

## V.

Your petitioner presents herewith a good and sufficient bond as provided as the statutes in such cases, that it will enter in the District Court of the United States, for the District of Arizona, within thirty (30) days from the date of the filing of this petition, a certified copy of the record in this suit, and that it will pay all costs which may be awarded by the said District Court in case the said Court shall hold that this suit was wrongfully [1\*] or improperly removed thereto.

Wherefore, your petitioner prays that this Court proceed no further herein, except to make an order accepting the bond presented herewith and directing

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

that a transcript of the record herein be made for filing in the United States District Court aforesaid.

GUST, ROSENFELD, DIVELBESS,  
ROBINETTE & LINTON,

By WALTER LINTON,

Attorneys for Defendant.

(Duly Verified.)

[Endorsed]: Filed May 3, 1947. [2]

---

[Title of Superior Court and Cause]

ORDER REMOVING CAUSE TO THE UNITED  
STATES DISTRICT COURT FOR THE  
DISTRICT OF ARIZONA.

On this, the 3rd day of May, 1946, this cause came on for hearing, and J. J. Newberry Company, the defendant named in the above entitled action having filed and presented its petition and bond for removal of this cause to the United States District Court, for the District of Arizona, and the Court finding the same to be in due form, and the surety to be good and sufficient, and said bond being hereby approved, hereby ORDERS that this cause be removed to the United States District Court, for the District of Arizona, and that no further proceedings be had in this court, unless and until the Federal Court shall remand the same.

M. T. PHELPS,  
Judge.

[Endorsed]: Filed May 3, 1947. [3]

[Title of Superior Court and Cause.]

## COMPLAINT

The Plaintiffs complain and allege as follows:

### I.

That the plaintiffs are husband and wife; that the defendant is a corporation duly organized and existing under the laws of the State of Delaware, and authorized to do business in the State of Arizona; that at all times hereinafter mentioned, the defendant corporation was and is doing business in the City of Phoenix, County of Maricopa, State of Arizona.

### II.

That on or about the 11th day of February, 1946, the defendant corporation had the possession and control of a certain retail store wherein it conducted its business at the northeast corner of the intersection of First Avenue and Washington Street in the City of Phoenix, County of Maricopa, State of Arizona; that at said time and place the defendant corporation has possession and control of a certain doorway into said retail store from the First Avenue side of said store; that at said time and place, said doorway was used by the customers of the defendant corporation for the purpose of entering and leaving the premises wherein the defendant corporation conducted its retail business; that said doorway on said First Avenue side was above the grade or level of the sidewalk on First Avenue adjacent to said building; [4] that in

order to enter or leave defendant's retail store through said doorway on said First Avenue, it was necessary to use a certain step connecting said doorway and said sidewalk aforesaid; that defendant's retail store at said time and place also had certain doorways on the Washington Street side of said store; that at said time and place and on the Washington Street side of the defendant's retail store, said doorways were on the same level or grade as the sidewalk adjoining the store.

### III.

That on the said day aforesaid, the plaintiff Etta Crandall, for the purpose of purchasing certain tissues in the defendant's store aforesaid, entered said store from the Washington Street side, inquired for said tissues, and being advised that the defendant was temporarily sold out of said tissues, proceeded to leave the defendant store through the doorway on the First Avenue side; that although the plaintiff, Etta Crandall, had entered said store through the Washington Street doorway, which was on the same level as the sidewalk adjoining said building, the plaintiff Etta Crandall received no notice or warning from the defendant that the doorway on the First Avenue side was not on the same level as the sidewalk adjacent thereto, and the plaintiff Etta Crandall received no notice from the defendant that a person leaving said doorway had to step down from the doorway on the First Avenue side to the sidewalk adjacent thereto; that the defendant was negligent in not giving such notice

or warning to the plaintiff in that, as aforesaid, the main doorway of the defendant on the Washington Street side is on the same level as the sidewalk, and further, in that the visibility of a person leaving the store on the First Avenue side is impaired in stepping from the dimly lit interior of the store into the brilliant sunshine of the exterior; that at said time and place, the plaintiff being unaware of said step, because she had entered the store [5] without the use of any steps on the Washington Street side of said store, and the plaintiff Etta Crandall's vision being impaired by the brilliant sunshine at said time and place, did not see said step; that the defendant was negligent also in that said step was not in a safe condition, in that said step had ridges and uneven places in said step; that said step at said time and place was so uneven so as not to afford the plaintiff a sure footing; that as a result of the condition of said step, as aforesaid, the plaintiff Etta Crandall tripped and fell to the ground.

#### IV.

That the unsafe condition of the said doorway and step, as aforesaid, was in existence for a long time prior to the time aforesaid, and was known, or should have been known, by the defendant, ~~\*in that many customers of the defendant had been injured prior to the time aforesaid as a result of the unsafe condition of said step and doorway, as aforesaid.~~ [\*Stricken; order of 6/25/48.]

#### V.

That the plaintiff Etta Crandall's fall was caused



by the negligence of the defendant as aforesaid; that as a result thereof, the plaintiff Etta Crandall was rendered sick and lame, suffered many bruises and contusions in and about her body, and suffered a fractured hip, and was confined to a hospital and to bed; that said injuries as aforesaid have permanently disabled the plaintiff Etta Crandall to her damage in the sum of Ten Thousand Dollars (\$10,000.00).

## VI.

That the plaintiff Etta Crandall at said time and place had been in attendance upon her husband, the plaintiff Merton L. Crandall, in nursing him back to health from pneumonia; that as a result of her injuries as aforesaid, the plaintiff Etta Crandall could no longer take care of her husband, the said Merton L. Crandall; [6] that the plaintiff Merton L. Crandall also expended hospital, medical and nursing expenses for the said plaintiff Etta Crandall in connection with the injuries aforesaid, all of the same resulting to the damage of the plaintiff Merton L. Crandall in the sum of Five Thousand Dollars (\$5,000.00).

Wherefore, the plaintiff Etta Crandall prays judgment against the defendant in the sum of Ten Thousand Dollars, and for her costs herein expended; the plaintiff Merton L. Crandall prays judgment against the defendant in the sum of Five Thousand Dollars, and for his costs herein expended; and the plaintiffs pray for such other and

further relief as may be meet, just and proper in the premises.

MAURICE D. BROWN,  
Attorney for Plaintiffs.

[Endorsed]: Filed April 12, 1947.

[Endorsed]: (Record on Removal) Filed June 2, 1947. [7]

---

In the United States District Court for the  
District of Arizona

MINUTE ENTRY OF FRIDAY, JUNE 27, 1947  
(Phoenix Division)

April 1947 Term. At Phoenix.

Honorable Dave W. Ling, United States District  
Judge, presiding.

CIV-1043

MERTON L. CRANDALL, et ux,  
Plaintiff,

vs.

J. J. NEWBERRY COMPANY,  
Defendant.

It Is Ordered that the Defendant's Motion to  
Strike herein be and it is granted. [10]

[Title of District Court and Cause.]

## ANSWER

Comes now the defendant, J. J. Newberry Company, a corporation, and for its answer to plaintiff's complaint, admits, denies and alleges as follows:

### I.

Admits the allegations contained in paragraphs I and II of plaintiff's complaint.

### II.

This defendant admits that the plaintiff Etta Crandall was in the defendant's store on or about the 11th day of February, 1946, and that the plaintiff attempted to leave the defendant's store from the First Avenue entrance, and admits that the doorway on the First Avenue entrance is not at the same level as the sidewalk adjacent thereto. This defendant denies each and every, all and singular, the remaining allegations of paragraph III of plaintiff's complaint.

### III.

This defendant denies that the condition of said doorway and step was unsafe and denies each and every, all and singular the remaining allegations of paragraph IV of plaintiff's complaint. [11]

### IV.

This defendant denies the allegations of paragraphs V and VI of plaintiff's complaint.



V.

This defendant, for further answer to plaintiff's complaint, alleges that if the plaintiff, Etta Crandall was injured or damaged, such injuries or damages were caused or contributed to by her own negligence.

Wherefore, having fully answered plaintiff's complaint, this defendant prays that said complaint be dismissed and for its costs herein incurred.

GUST, ROSENFELD, DIVELBESS,  
ROBINETTE & LINTON,  
By WALTER LINTON,  
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed July 2, 1947. [12]

---

In the United States District Court for the  
District of Arizona

MINUTE ENTRY OF TUESDAY, APR. 6, 1948  
(Phoenix Division)

April 1948 Term. At Phoenix.

Honorable Dave W. Ling, United States District  
Judge, presiding.

[Title of Cause.]

This case comes on regularly for trial this date. The plaintiffs are present with counsel, Maurice Brown, Esquire, and Samuel Langerman, Esquire.

Walter Linton, Esquire, and Harold Divelbess, Esquire, are present for the defendant. Louis L. Billar is present as official reporter.

Both sides announce ready for trial.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all jurors not empaneled in the trial of this case be excused until further order.

Counsel for the Plaintiffs now reads the Complaint to the Jury and thereafter, counsel for the defendant reads the Answer to the Jury.

#### PLAINTIFFS' CASE:

The following plaintiffs' witnesses are now sworn and examined: Marie Cooley, Donna Mae Cooley, Charles C. Huffman.

Etta Crandall is now sworn and examined in her own behalf.

Merton L. Crandall is now sworn and examined in his own behalf.

The following plaintiffs' exhibits are now admitted in evidence: 1. Hospital bill; 2. Hospital bill; 3. Receipt; 4. Receipt; 5. 8 Cancelled checks; 6A. Cancelled check.

And thereupon, at the hour of twelve o'clock noon, It Is Ordered that the further trial of this case be continued until two o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m., the jury and all members thereof, the parties and their respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

### PLAINTIFFS' CASE CONTINUED:

Merton L. Crandall is now recalled and further examined in his own behalf.

Etta Crandall is now recalled and further examined in her own behalf.

Mathew Cohen is now sworn and examined on behalf of the defendants.

Whereupon, the plaintiffs rest.

And thereupon, at the hour of 2:50 o'clock p.m., the Jury is admonished and excluded from the court room.

Counsel for the defendant now moves for a directed verdict and It Is Ordered that said motion be and the same is denied.

### DEFENDANT'S CASE:

Charles C. Huffman, heretofore sworn, is now called and examined on behalf of the defendants.

Joe Scott is now sworn and examined on behalf of the defendants.

The following defendant's exhibits are now admitted in evidence: A. Diagram; B. Diagram.

And thereupon, at the hour of 3:40 o'clock p.m., pursuant to stipulation of counsel, It Is Ordered that the bailiff conduct the jury to view premises

herein accompanied by counsel, and that said jury be excused thereafter until ten o'clock a.m., Wednesday, April 7, 1948,

Said jury is now duly admonished by the Court and now retire in charge of their bailiff.

It Is Ordered that the further trial of this case be continued until ten o'clock a.m., Wednesday, April 7, 1948, to which time the parties and counsel are excused. [17]

---

In the District Court of the United States for the  
District of Arizona

MINUTE ENTRY OF WEDNESDAY,  
APRIL 7, 1948—(Phoenix Division)

April 1948 Term. At Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause.]

The Jury, and all members thereof, the parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

DEFENDANT'S CASE CONTINUED:

Hugh John Miller is now sworn and examined on behalf of the defendant.

Defendant's Exhibit C, photograph, is now admitted in evidence.

Charles C. Huffman is now recalled and further examined on behalf of the defendant.

Thereupon, the defendant rests.

REBUTTAL:

Etta Crandall is now recalled and further examined in her own behalf.

Thereupon, at the hour of 10:15 o'clock a.m., the Jury being first duly admonished by the Court, It Is Ordered that this Court do stand at recess to 11:30 o'clock a.m.

Subsequently, at the hour of 11:30 o'clock a.m., the Jury and all members thereof, all parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

REBUTTAL CONTINUED:

Elvera Magnuson is now sworn and examined on behalf of the plaintiffs.

And the Plaintiffs rest.

Both sides rest.

All the evidence being in, the case is argued by counsel for the plaintiffs to the Jury.

And thereupon, at the hour of twelve o'clock noon, It Is Ordered that the further trial of this case be continued to the hour of two o'clock p.m., this date, [18] to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m.,

the Jury and all members thereof, the parties and their respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

The case is now further argued by respective counsel to the Jury. Whereupon, the Court duly instructs the Jury and said Jury retire at the hour of 3:10 o'clock p.m. in charge of a sworn bailiff to consider of their verdict.

Counsel for both sides now waive their presence at reception of verdict.

Subsequently, the Jury return in a body into open Court at the hour of 4:25 o'clock p.m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon the foreman reports that they have agreed and presents the following verdict, to-wit:

[Title of Cause.]

## VERDICT

CIV-1043—Phoenix

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs, and assess their damages at \$12,500.00.

\$10,000.00 for Mrs. Etta Crandall

\$2,500.00 for Mr. Merton Crandall for expenses incurred in this damage suit plus Court costs *f*

THOMAS P. OWEN,  
Foreman.

The verdict is read as recorded, and the Jury is



discharged from the further consideration of this case and excused to further order.

[Endorsed]: Filed April 7, 1948. [19]

---

In the District Court of the United States  
for the District of Arizona

MINUTE ENTRY OF MONDAY, APR. 12, 1948  
(Phoenix Division)

April 1948 Term. At Phoenix.

Honorable Dave W. Ling, United States District  
Judge, presiding.

Civil No. 1043—Phoenix

MERTON L. CRANDALL and ETTA

CRANDALL, his wife,

Plaintiffs,

vs.

J. J. NEWBERRY COMPANY, a corporation,

Defendant.

### JUDGMENT

This cause came on regularly for trial, the said parties appearing by their attorneys. A jury of twelve persons were regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiffs and defendant were sworn and examined. After hearing the evidence, the argument of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned into court, and through their Foreman, Thomas P. Owen, say they find a verdict

for the plaintiff Etta Crandall in the sum of Ten Thousand Dollars (\$10,000) and for the plaintiff Merton L. Crandall in the sum of Twenty-five Hundred Dollars (\$2,500), together with the said plaintiffs' costs and disbursements incurred in this action.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that the said plaintiff Etta Crandall do have and recover of the said defendant the sum of Ten Thousand Dollars (\$10,000) with interest thereon at the rate of Six Percent (6%) per annum from the date hereof until paid, and that the plaintiff Merton L. Crandall do have and recover of the said defendant the sum of Twenty-five Hundred Dollars (\$2,500) with interest thereon at the rate of Six Percent (6%) per annum from the date hereof until paid, together with the said plaintiffs' costs and disbursements incurred in this action, taxed in the sum of \$66.92.

Dated, this 12 day of April, 1948.

DAVE W. LING,  
Judge.

Approved as to form.

WALTER LINTON,  
Attorney for Defendant. [21]

(Clerk's note: Amended—\$745.95 of \$2,500 amt. remitted.—WHL.)

[Endorsed]: Filed April 12, 1948. [22]



In the District Court of the United States in and  
for the District of Arizona

Civil No. 1043—Phoenix

MERTON L. CRANDALL and ETTA

CRANDALL, his wife,

Plaintiffs,

vs.

J. J. NEWBERRY COMPANY, a corporation,

Defendant.

### JUDGMENT

This cause came on regularly for trial, the said parties appearing by their attorneys. A jury of twelve persons were regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiffs and defendant were sworn and examined. After hearing the evidence, the argument of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned into court, and through their Foreman, Thomas P. Owen, say they find a verdict for the plaintiff Etta Crandall in the sum of Ten Thousand Dollars (\$10,000) and for the plaintiff Merton L. Crandall in the sum of Twenty-five Hundred Dollars (\$2,500), together with the said plaintiffs' costs and disbursements incurred in this action.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that the said plaintiff Etta Crandall do

have and recover of the said defendant the sum of Ten Thousand Dollars (\$10,000) with interest thereon at the rate of Six Percent (6%) per annum from the date hereof until paid, and that the plaintiff Merton L. Crandall do have and recover of the said defendant the sum of Twenty-five Hundred Dollars (\$2,500) with interest thereon at the rate of Six Percent (6%) per annum from the date hereof until paid, together with the said plaintiffs' costs and disbursements incurred in this action, taxed in the sum of \$66.92. [23]

Dated, this 12th day of April, 1948.

DAVE W. LING,  
Judge.

Approved as to form.

WALTER LINTON,  
Attorney for Defendant.

[Endorsed]: Filed April 12, 1948. [24]

---

[Title of District Court and Cause.]

Civil Docket

### PROCEEDINGS

Apr. 12-14—Enter and file Judgment for pltf. Etta Crandall in sum of \$10,000.00 and for Merton L. Crandall in sum of \$2,500 (Notation entered in Civil and Judgment Dockets 4/12/48).

May 5—Samuel Langerman for pltf. No appearance for deft. It appearing to the court that the jury herein in its verdict assessed damages

for pltf. Merton L. Crandall in sum of \$2,500, and that \$745.95 of said amount is excessive, Order said excessive amount of \$745.95 be remitted and judg. amended. (Notation entered in Civil Docket 5/5/48.) [25]

---

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND  
JUDGMENT, OR, IN THE ALTERNATIVE  
MOTION FOR NEW TRIAL

Comes now the defendant, J. J. Newberry Company, a corporation, and moves the court for an order setting aside the verdict and judgment in the above entitled cause, and granting the defendant's motion for directed verdict made at the close of all the evidence.

In the event said motion be not granted, the defendant moves the court for an order setting aside the judgment herein, and granting a new trial of the above entitled cause, for the following reasons:

1. The verdict and judgment is not justified by the evidence.
2. The verdict and judgment are not justified by the evidence and are contrary to law.
3. The verdict and damages awarded were so excessive that they indicate gross error and reckless disregard of the evidence, and the law, on the

part of the jury, and that the jury was actuated by passion or prejudice in arriving at its verdict. [26]

4. The court erred in refusing defendant's motion for directed verdict at the close of the entire case.

Dated this 19th day of April, 1948.

GUST, ROSENFELD, DIVELBESS,  
ROBINETTE & LINTON,

By /s/ Walter Linton

Attorneys for Defendant.

Received copy of within this 19 day of April,  
1948.

BROWN & LANGERMAN,  
Attorneys for Plaintiffs.

[Endorsed]: Filed Apr. 19, 1948. [27]

---

In the District Court of the United States  
For the District of Arizona

MINUTE ENTRY OF MONDAY, MAY 3, 1948  
(Phoenix Division)

April 1948 term, at Phoenix.

Honorable Dave W. Ling, United States District  
Judge, presiding.

[Title of Cause]

Defendant's Motion to Set Aside Verdict and  
Judgment, or in the alternative Motion for New  
Trial comes on regularly for hearing this day.  
Samuel Langerman, Esquire, appears as counsel

for the plaintiffs, and Walter Linton, Esquire, appears as counsel for the defendant. Said motion is now duly argued by respective counsel. Said counsel for plaintiffs states that plaintiffs will remit any amount which counsel may stipulate is excessive; whereupon,

It is ordered that defendant's Motion to Set Aside Verdict and Judgment, or in the alternative Motion for New Trial be and it is denied. [28]

---

In the District Court of the United States  
For the District of Arizona

MINUTE ENTRY OF WEDNESDAY, MAY  
5, 1948

(Phoenix Division)

April 1948 term, at Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause]

Samuel Langerman, Esquire, appears as counsel for the plaintiffs. No appearance is made on behalf of the defendant.

It appearing to the Court that the Jury herein in its verdict assessed damages to the plaintiff Merton L. Crandall in the sum of \$2,500.00, and that \$745.95 of said amount is excessive,

It is ordered that said excessive amount of \$745.95 be remitted. [29]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that J. J. Newberry Company, a corporation, defendant, does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that certain judgment rendered in the above entitled court and cause on the 12th day of April, 1948, and from the order denying defendant's motion for new trial, made and entered on the 3rd day of May, 1948.

Dated the 28th day of May, 1948.

GUST, ROSENFELD, DIVELBESS,  
ROBINETTE & LINTON,

By /s/ Harold L. Divelbess

Attorneys for J. J. Newberry  
Company.

[Endorsed]: Filed May 28, 1948. [30]

---

[Title of District Court and Cause.]

### BOND ON APPEAL AND SUPERSEDEAS BOND

Know All Men By These Presents:

That we, J. J. Newberry Company, a corporation, as principal, and Fidelity & Deposit Company of Maryland, a surety company duly authorized to write surety bonds in the State of Arizona, as surety, are held and firmly bound, jointly and severally, unto Merton L. Crandall and Etta Crandall, his wife, the plaintiffs in the above-entitled cause,



in the penal sum of Thirteen Thousand (\$13,000.00) Dollars, lawful money of the United States, to be paid to the above-named plaintiffs, their executors, administrators or assigns, for the payment of which sum well and truly to be paid, we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of May, 1948.

The condition of the above obligation is such that

Whereas, a judgment was rendered in the above entitled cause on the 12th day of April, 1948, against the defendant and in favor of the plaintiffs therein, and the defendant after the entry of said judgment duly filed its motion for a new trial in said cause, and an order was made and entered in the above entitled cause on the 3rd day of May, 1948, denying said [31] motion for a new trial; and

Whereas, said defendant has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the said judgment made and entered in said cause on the 12th day of April, 1948, and also from the order denying said motion for a new trial made and entered on the 3rd day of May, 1948; and

Whereas, the defendant and appellant desires to suspend the execution of the above-described judgment during the pendency of the appeal therefrom;

Now, therefore, if the said J. J. Newberry Company shall prosecute its said appeal with effect,

and if it shall satisfy the judgment of the United States Circuit Court of Appeals for the Ninth Circuit in full, together with costs and interest, if said judgment be against it, and shall pay all such damages and costs as may be awarded against it on said appeal; then this obligation shall be void, otherwise it shall remain in full force and effect.

In witness whereof, the undersigned have executed this appeal and supersedeas bond this 28th day of May, 1948.

J. J. NEWBERRY COMPANY,  
Principal

By GUST, ROSENFELD, DIVELBESS,  
ROBINETTE & LINTON,

By James C. Engdahl,  
Its Attorneys.

FIDELITY & DEPOSIT COMPANY  
OF MARYLAND,

By C. A. Drummond,  
Attorney-in-fact.

The foregoing appeal and supersedeas bond is approved and directed to be filed this 28th day of May, 1948.

DAVE W. LING,  
Judge. [32]

[Endorsed]: Filed May 28, 1948. [33]



ORDER FOR TRANSMITTAL OF CERTAIN  
ORIGINAL EXHIBITS AND REPORTER'S  
TRANSCRIPT TO CIRCUIT COURT OF  
APPEALS

Counsel for the appellant having designated that all exhibits in this case, together with the reporter's transcript, be contained in the record on appeal herein and it appearing to the court that the originals thereof, in lieu of copies, should be transmitted to the Circuit Court of Appeals,

It is ordered that the Clerk of this Court be and he is authorized and directed to transmit the original Reporter's Transcript, the originals of plaintiffs' exhibits 1, 2, 3, 4, 5 and 6-A, and of defendant's exhibits A, B and C, to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal in this case.

Dated at Phoenix, Arizona, this 30th day of June, 1948.

DAVE W. LING,  
United States District Judge.

[Endorsed]: Filed June 30, 1948. [35]

---

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE REC-  
ORD AND PROCEEDINGS TO BE CON-  
TAINED IN RECORD ON APPEAL

Comes now the above named defendant and appellant, and designates the following portions of

the record and proceedings to be contained in the record on appeal:

1. Complaint,
2. Answer,
3. Verdict of Jury,
4. Judgment,
5. Defendant's Motion For New Trial,
6. The Clerk's notation of Judgment in the civil docket,
7. Final Judgment, as entered by the Clerk in the Minute Book,
8. All Exhibits marked for identification, or received in evidence in the case,
9. The Reporter's Transcript,
10. All Minute Entries made by the Clerk in said cause,
11. Notice of Appeal,
12. Bond on Appeal and Supersedeas Bond,
13. This Designation.

Dated this 4th day of June, 1948.

GUST, ROSENFELD, DIVELBESS,  
ROBINETTE & LINTON,

By Harold L. Divelbess.

Attorneys for Defendant and  
Appellant. [36]

Received copy of within this 4th day of June,  
1948.

BROWN & LANGERMAN,  
Attorneys for Pltfs.

By R. Truxal.

[Endorsed]: Filed June 4, 1948. [37]

In the United States District Court for the District  
of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD

United States of America,  
District of Arizona—ss:

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Merton L. Crandall and Etta Crandall, his wife, Plaintiffs, vs. J. J. Newberry Company, a corporation, Defendant, numbered Civ-1043 Phoenix, on the docket of said Court.

I further certify that the attached pages numbered 1 to 38, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Appellant's Designation filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record remaining on file in my office, with the exception of the Reporter's Transcript, Plaintiffs' exhibits 1, 2, 3, 4, 5 and 6A and Defendant's exhibits A, B and C. I further certify that the original of the Reporter's Transcript filed herein, and the originals of Plaintiff's exhibits 1, 2, 3, 4, 5 and 6A, and of Defendant's exhibits A, B and C,

are transmitted herewith and made a part of the record on appeal herein, pursuant to order of the Court.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$13.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 2nd day of July, 1948.

(Seal)            /s/ WM. H. LOVELESS,  
Clerk. [38]

---

In the District Court of the United States for the  
District of Arizona

No. Civ. 1043—Phx.

MERTON L. CRANDALL and ETTA  
CRANDALL, His Wife,

Plaintiffs,

vs.

J. J. NEWBERRY COMPANY, a Corporation,  
Defendant.

### REPORTER'S TRANSCRIPT

The above entitled and numbered cause came on duly and regularly to be heard in the above entitled court, before Hon. Dave W. Ling, Judge, presiding with a jury, commencing at the hour of ten o'clock, A.M., on the 6th day of April, 1948, at Phoenix, Arizona.

The plaintiffs were represented by Messrs. M. D. Brown and Samuel Langerman.

The defendant was represented by Mr. Walter Linton and Mr. Harold Divelbess, of Messrs. Gust, Rosenfeld, Divelbess, Robinette & Linton.

The following proceedings were had:

The Court: All right, you may call the calendar.

The Clerk: Civil 1043, Phoenix, Merton L. [1\*] Crandall and Etta Crandall, his wife, plaintiffs, versus J. J. Newberry Company, a corporation, defendant, for trial.

The Court: Ready?

Mr. Brown: The plaintiffs are ready your Honor.

Mr. Linton: The defendant is ready, your Honor.

The Court: Call the names of 18 jurors. As your names are called, come forward, please.

(Whereupon 18 jurors were called, examined on their voir dire, after which 12 jurors were empaneled and sworn, and the pleadings were read to the jury by counsel for the respective parties.)

The Court: Do you want to make an opening statement?

Mr. Langerman: We waive the opening statement.

The Court: All right, call your first witness.

Mr. Langerman: Mrs. Marie Cooley. Your Honor, we are calling both Mrs. Marie Cooley and Mrs. Donna May Cooley just a little bit out of their ordinary turn, as they have a sick baby and they have to get back.

The Court: All right. [2]

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

## MARIE COOLEY

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

## Direct Examination

Mr. Langerman:

Q. Will you state your name, please?

A. Marie Cooley.

Q. Are you a resident of Phoenix, Arizona?

A. Yes, sir.

Q. What is your occupation, Mrs. Cooley?

A. I am a housewife.

Q. Are you acquainted with the plaintiff, Mrs. Etta Crandall?

A. No, sir; I am not.

Q. On or about the 11th day of February, 1946, did you have occasion to be walking near the Newberry Store in Phoenix, Arizona?

A. Yes, sir.

Q. Were you alone at that time?

A. No, I was with my sister-in-law, Mrs. Donna May Cooley.

Q. About what time?

A. Well, I don't have any idea what time it was.

Q. Was it in the morning or in the afternoon?

A. Well, I could not truthfully say, because I [3] don't remember.

Q. It was during daytime?

A. Yes, sir.

Q. As you walked, did you have occasion to walk by the Newberry store?

A. Yes, sir—in fact, we were going in to the door, I think. It was our intentions.



(Testimony of Marie Cooley.)

Q. As you walked toward the door of the Newberry Store, which door was this?

A. Well, this one on First Avenue.

Q. As you walked toward that door, Mrs. Cooley, did you see the plaintiff, Mrs. Etta Crandall?

A. Yes, sir; we did.

Q. Where was she?

A. She was in the doorway.

Q. And what was she doing at the time you saw her?

A. She was falling.

Q. Mrs. Cooley, is there a space between the doorway of the First Avenue entrance to the Newberry Store and the sidewalk?

A. Well, there is a space between the door and the step, yes.

Q. How large a space is there?

A. Oh, I'd say two feet.

Q. And when you saw Mrs. Crandall, she was[4] in the doorway?

A. Yes, sir.

Q. And you said she was falling?

A. Yes, sir.

Q. What direction was she facing; was she facing any part of the Newberry Store, or outside?

A. She was facing the outside.

Q. Then what happened, Mrs. Cooley?

A. Well, the way I remember it, she was coming through the door, she was falling, and when she got to the step it seemed to turn her foot some way and she fell backwards onto the step onto the sidewalk.

(Testimony of Marie Cooley.)

Q. Where did she land?

A. She landed about three to five feet out on the sidewalk.

Q. Now, let me be clear on one thing, Mrs. Cooley. Was Mrs. Crandall already falling when you first saw her?

A. She was falling, yes, sir.

Q. Was she in the doorway?

A. She was coming through the door, yes.

Q. And that is a couple of feet, you said, prior to the time she reached that step?

A. Yes, I think it is that far.

Q. Are you aware of the cause of her fall? [5]

A. No, sir.

Q. Well, what, if anything, did you do then, Mrs. Cooley?

A. Well, we tried to catch her before she fell, and when we got to her, we picked her up and helped take her into the store, sir, I mean, back into the store.

Q. Just what happened?

A. Someone gave a chair for her and we sat her down and we stood there for a few minutes until the manager or someone came down, I am not sure it was the manager, and then we left.

Q. Mrs. Cooley, you stated you didn't know the plaintiff, Mrs. Crandall. Had you ever seen her prior to that time?

A. I had never seen her before she fell, no, sir.

Q. And did she become aware of who you were?

A. Well, I think—I was told that an old friend



(Testimony of Marie Cooley.)

of ours that works for Newberry gave our name and address.

Q. Gave you her name?

A. No, gave someone, some lawyer, I don't know, our name and address.

Q. You did not know Mrs. Crandall?

A. No; I never saw her but twice before now.

Q. You have no interest at all in the outcome of this trial?      A. No.

Q. Did you ever visit Mrs. Crandall at the hospital?

A. Yes, sir; I did one time, and she was very sick. I didn't talk to her.

Mr. Langerman: I have no further questions.

Mr. Linton: No questions, your Honor.

(The witness was excused).

Mr. Langerman: Call Mrs. Donna May Cooley.

---

DONNA MAY COOLEY

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

Mr. Langerman:

Q. Will you state your name, please?

A. Donna May Cooley.

Q. What is your residence?

A. 3300 South Sixteenth Street.

Q. And what is your occupation?

A. Housewife.

(Testimony of Donna May Cooley)

Q. Do you know the plaintiff, Mrs. Etta Crandall? [7]

A. Well, I had never seen her until the accident.

Q. Do you now know her? A. Yes.

Q. Where did you become acquainted with her?

A. Well, in the hospital.

Q. You visited her at the hospital?

A. Yes, I did.

Q. On the 11th of February, 1946, Mrs. Cooley, did you have occasion to be walking near the Newberry Store in Phoenix, Arizona? A. Yes.

Q. Did you have occasion at that time to be on the First Avenue side entrance to that store?

A. Yes.

Q. Do you remember approximately what time of the day that was?

A. Well, not exactly, but I think it was somewhere close to noon.

Q. And on that occasion did you see the plaintiff, Mrs. Etta Crandall? A. I did.

Q. Where was she when you saw her?

A. She was in the doorway.

Q. Coming through the doorway?

A. Yes. [8]

Q. What direction was she going when you saw her?

A. She was going out toward First Avenue.

Q. Exiting from the store? A. Yes.

Q. What, if anything, was she doing at the time you first saw her? A. She was falling.

(Testimony of Donna May Cooley)

Q. What happened then, Mrs. Cooley?

A. Well, when she got to the ledge she seemed to give way and just went completely down.

Q. Did her falling start prior to the time she got to the Ledge, Mrs. Cooley?      A. Yes, it did.

Q. What happened after she fell?

A. Well, she, somehow, in the stumbling, she turned herself some way and she fell out on the street.

Q. By "street", you mean the sidewalk?

A. The sidewalk.

Q. And then what happened, Mrs. Cooley?

A. Well, we rushed to her, tried to get there before she went completely down, but we didn't, and we helped her up and helped her into the store.

Q. And then what happened?

A. Well, I got a chair from my girl friend [9] and we sat her down in it until someone from upstairs came down with the manager and took her up.

Q. Subsequent to that time you have seen Mrs. Crandall?      A. Yes.

Q. At the hospital?      A. Yes.

Q. Well, the acquaintance with Mrs. Crandall, then, is in connection with this accident, is that right?      A. That is right.

Q. You have no interest at all in the outcome of this trial?      A. No.

Q. What condition was Mrs. Crandall in when you visited her at the hospital?

A. She was a very sick lady.

(Testimony of Donna May Cooley)

Q. How many times did you visit her?

A. Well, I wouldn't know exactly, maybe half a dozen times.

Mr. Langerman: I have no further questions.

The Court: You may cross examine.

Mr. Linton: No questions, your Honor.

Mr. Langerman: Your Honor, may we have these witnesses excused?

Mr. Linton: Very well. [10]

The Court: Yes.

Mr. Langerman: Call Mr. Huffman. Your Honor, prior to the beginning of this examination I'd like to point out that Mr. Huffman, while not a party to this suit, he is the manager of the Newberry Store and we are requesting that we be permitted to examine him as a hostile witness.

The Court: I never heard of such a thing.

Mr. Linton: I certainly object.

The Court: I never heard of such a proceeding.

---

CHARLES C. HUFFMAN

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

The Court: Let's get this straightened out. Are you calling him as your witness?

Mr. Langerman: Yes, we are, your Honor.

The Court: All Right.

Direct Examination

Mr. Langerman:

Q. Will you state your name, please?

A. Charles C. Huffman.

(Testimony of Charles C. Huffman.)

Q. What is your occupation, Mr. Huffman?

A. Store manager. [11]

Q. Of what store?

A. The J. J. Newberry Company.

Q. Is that here in Phoenix, Arizona?

A. Yes, sir.

Q. How long have you been manager of the Phoenix Arizona Newberry store?

A. 14 years.

Q. Can you tell us, Mr. Huffman, how long—  
strike that. Are you familiar, Mr. Huffman, with  
the condition of the construction of the doorway  
on the First Avenue side entrance of your Newberry  
Store? A. I am.

Q. Can you tell us, Mr. Huffman, whether or  
not the construction which now exists existed on  
February 11th, 1946?

A. It was the same construction.

Q. How long prior to that time had the same  
construction existed? A. Since 1938.

Q. In other words, since '38 there has been no  
alterations or changes in the construction of that  
doorway in that entrance? A. That is right.

Q. Now, by "doorway", Mr. Huffman, I mean  
to include not only the doorway itself, but every-  
thing [12] leading from the doorway to the side-  
walk. Does the same answer apply? A. Yes.

Q. Mr. Huffman, have you had any notice of—  
strike that. Mr. Huffman, have any persons fallen  
in that—

(Testimony of Charles C. Huffman.)

Mr. Linton: We object to that, your Honor, that has been ruled on.

The Court: All right.

Mr. Langerman: Your Honor, we are merely trying to establish notice of the condition of that doorway, and I know of no better way to establish notice than to establish that persons prior to that date of this accident have fallen there, and Mr. Huffman—

The Court: Ask him whether he had any notice, he is under oath.

Mr. Langerman: Did you have any notice prior to the time of this— prior to February 11th, 1946, Mr. Huffman, of any unsafe conditions in the doorway of the First Avenue side of the Newberry Store, the First Avenue entrance of the Newberry Store?           A. No, sir.

Mr. Langerman: We have nothing else at this time. [13]

Mr. Linton: No questions.

(The witness was excused).

Mr. Langerman: Mrs. Etta Crandall. [14]

---

ETTA CRANDALL

was called as a witness in her own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Langerman:

Q. Will you state your name?

A. I don't hear you.



(Testimony of Etta Crandall.)

Q. Will you state your name?

A. Etta Crandall.

Q. Are you one of the plaintiffs in this case?

A. I am.

Q. On or about the 11th day of February, 1946, Mrs. Crandall, did you have occasion to go into the Newberry Store here in Phoenix, Arizona?

A. I did.

Q. How long had you been in Phoenix prior to that date?

A. We arrived here on Friday, the 8th.

Q. The 8th of February?

A. That is right.

Q. Had you ever been in Phoenix prior to that time? A. I had not.

Q. Had you ever been in the Newberry Store prior to the occasion to which we now refer? [15]

A. No.

Q. What was the purpose of your going into Newberry's Store? A. To get some tissues.

Q. Can you tell the Court what entrance you entered as you entered into Newberry's Store?

A. On the Washington.

Q. And did you purchase any tissues, Mrs. Crandall?

A. I did not. I was told they didn't have any.

Q. Approximately what time of the day was that, Mrs. Crandall?

A. Well, some time before noon.

Q. And after being told that there were no tissues, what did you do?



(Testimony of Etta Crandall.)

A. I walked on out to the rear, the side entrance on First.

Q. Is that the entrance on First Avenue?

A. That is right.

Q. And did you walk out of the doorway of that exit?      A. I started to.

Q. And then what happened?

A. Well, all at once my left foot was insecure. I don't know what happened, and I tried to reach and grab something and I just kept going into space. [16] Apparently, I struck something.

Q. You stated that your left foot was insecure, Mrs. Crandall. To the best of your ability, will you tell the Court what caused that insecurity?

A. Well, I just seemed to strike something or slip in some way. I couldn't explain how, just as I struck that threshold there.

Q. Now, by "threshold" you mean the threshold in that doorway?      A. Yes, sir.

Q. And after striking the threshold in the doorway, what happened?

A. Well, I just kept groping and trying to reach—headlong into space, and there I was on the walk.

Q. Did you succeed in holding onto something?

A. I couldn't find anything apparently. I just felt as though I was hurled.

Q. What happened then?

A. I was so badly injured apparently I couldn't rise. I knew it was in my hip or leg somewhere.

(Testimony of Etta Crandall.)

Q. What happened after you fell, Mrs. Crandall?

A. Well, several rushed up to me and I really can't remember who took me in, but someone, though, carried me in. They put me up in a chair and I scarcely talked, and I begged them not to take me [17] upstairs, because someone insisted on it. I said, "Please don't move me again, but they insisted on carrying me up some way, one or two flights, I don't know.

Q. Were you alone when you entered the Newberry Store?      A. I was.

Q. Had you come to Phoenix alone?

A. No, my husband.

Q. He was with you?      A. Mr. Crandall.

Q. And where was he at the time all of this was going on?

A. He was at the lobby of the San Carlos.

Q. And was he informed of what had happened?

A. Well, I managed to ask someone to please page him over there. He was waiting for me because he was not able to go out and find—he was going to find a new place to free us, rather, from that hotel if we could.

---

Q. I neglected to ask, Mrs. Crandall, what was the occasion for your having come to Phoenix?

A. In the first instance, well, Mr. Crandall had been ill, extremely ill, in September, and for many weeks he couldn't go on at all, and finally the doctor there suggested that he try a [18] little stay in

(Testimony of Etta Crandall.)

Phoenix, get a lot of sunshine. He had pleural pneumonia.

Q. You say he had been ill in September?

A. Well, that is when he was ready to leave the hospital.

Q. And from September until February 11th, the date of this accident, was he hospitalized or was he out of the hospital?

A. He was at home but I had to take care of him day and night because he was unable to wait on himself to amount to anything. He could get out and walk around a little bit but he could not accomplish anything either sitting or lying down.

Q. Now, returning, Mrs. Crandall, to the day of the accident. After you had been taken upstairs were you subsequently taken some other place?

A. Over to the St. Monica's.

Q. And how were you taken there?

A. Ambulance.

Q. And were you under the care of a physician there?      A. Dr. Cohen.

Q. Now, prior to the time that Dr. Cohen undertook to take care of you, had you ever known him before?      A. I had not. [19]

Q. Have you ever had any acquaintance of any sort with him?      A. No, sir.

Q. How did you happen to select him?

A. Well, I knew nothing about it. I was almost unconscious by that time. I really didn't know who

(Testimony of Etta Crandall.)

he was, or, someone, one of the nurses, I suppose was the head nurse, said that he was a good surgeon.

Q. Returning again for the moment to what happened up at Newberry's Store. Describe again how you walked out of that door.

A. Well, I just started out in my natural way.

Q. Were you expecting any obstruction of any sort in the doorway? A. No.

Q. Prior to the time of this accident was there anything—did you have any defects of any sort in your walking? A. None whatever.

Q. Do you have any defects of any sort with your eyes? A. No, sir.

The Court: We will have our morning recess at this time. During the recess, ladies and gentlemen of the jury, you are not to discuss this case [20] among yourselves or permit anyone to discuss it with you, also avoid forming or expressing any opinion upon any subject connected with it. The Court will stand at recess for five minutes.

(Thereupon a short recess was taken, after which all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Etta Crandall resumed the witness stand and testified further as follows:

Q. Mrs. Crandall, you stated that you have no defects with your eyes. You do wear glasses, do you not? A. I have worn them a long time.

Q. Were you wearing them at the time of this accident? A. Yes.

(Testimony of Etta Crandall.)

Q. And with those glasses is your vision normal?

A. Supposed to be, yes, sir.

Q. Mrs. Crandall, as you walked out of the Newberry Store, what rate of speed were you walking at, was it a normal rate of speed, faster than normal, slower than normal?

A. Going, I would say, just what would be normal. I was not in any particular hurry. [21]

Q. In other words, you just walked out in a normal manner? A. Oh, yes.

Q. How old were you, Mrs. Crandall, at the time of that accident? A. 68.

Q. What was the condition of your health prior to the time of the accident? A. Very good.

Q. As a result of this fall, Mrs. Crandall, did you suffer any injuries? A. Any injuries?

Q. Yes. A. My hip was broken.

Q. And were you hospitalized? A. I was.

Q. How long a period were you hospitalized?

A. 11 weeks.

Q. Were you permitted to be up and around during that time, Mrs. Crandall?

A. I had casts.

Q. You had a cast?

A. A cast for nine weeks and then I laid there three weeks longer.

Q. And during all of that time the doctor who cared for you was Dr. Cohen? [22]

A. That is right.

(Testimony of Etta Crandall.)

Q. In addition to Dr. Cohen's care, did you find it necessary to have the care of any private nurse?

A. At the end of two or three weeks he said I would not get along unless I had a special, so we paid a special nurse for eight weeks.

Q. That was the balance of the time that you were in the hospital?           A. Up to that time.

Q. When you left the hospital did you then dispense with the private nurse?

A. No, we had to take one back home with us.

Q. Where is your home, Mrs. Crandall?

A. Hudson, Michigan.

Q. How did you get back to your home?

A. Ambulance to the train. They had to take me into a drawing room and I had this girl with me, this nurse.

Q. By "this girl" you mean the nurse?

A. The nurse.

Q. She traveled with you?

A. Yes, took her back home and had her there three weeks. I was in bed a month after that.

Q. At your home?           A. That is right. [23]

Q. When you got off the train did you—what means of transportation did you use to get to your home?

A. Well, we left the train at Chicago, and the ambulance from Hudson came to take us home.

Q. Mrs. Crandall, in your complaint you have alleged that you suffered—that you were made sick and lame and that you were permanently disabled



(Testimony of Etta Crandall.)

by this fall. Will you tell the Court in what respects you were rendered disabled by this fall?

A. Well, this left leg is shorter, but the rotation, I have lost perhaps half the rotation of the left leg.

Q. Is that the present condition of the left leg?

A. That is the present condition.

Q. Are you able to perform at the present time the duties you were able to perform prior to this accident?

A. Not the same. I will never be able to because I can't raise that foot or bend the same way. In going upstairs it is very difficult. I have lost half the power of lifting.

Q. As a result of the injuries which you suffered, did you have any pain? [24]

A. At the time?

Q. At any times.

A. Oh, extreme.

Q. When was that; will you describe it?

A. In the hospital.

Q. Mrs. Crandall, prior to the time that this accident occurred, you have stated you were taking care of your husband?

A. Yes, sir.

Q. Did he require the care of someone?

A. Well, he did in this way, he could just about sit up a little bit and lie down, and I had to get him special meals, and I do all of the errands anyway. He wasn't out of the house for months.

Q. After you were injured, did anybody take care of your husband?

A. I did.

Q. After your injury?

A. Oh, no, I misunderstood that.



(Testimony of Etta Crandall.)

Q. Did he have anybody take care of him?

A. Well, he was in the hospital also.

Q. What day did he enter the hospital?

A. The same day.

Q. Do you know what the purpose was of his entering the hospital? [25]

A. Well, I would say because he was unable to go out in a room and get his—the food that he would need, or do any errands for himself because he was not going about like that.

Q. In other words, Mrs. Crandall, the accident to you made it necessary for him to also go to the hospital to have someone take care of him?

A. That is right.

Q. And prior to that time you were doing that yourself? A. I was.

Mr. Langerman: That is all.

Mr. Linton: No questions.

(The witness was excused). [26]

---

Mr. Langerman: Mr. Crandall.

MERTON L. CRANDALL

was called as a witness in his own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Langerman:

Q. Please state your name.

A. Merton L. Crandall.

Q. Are you one of the plaintiffs in this case?

A. I am.

Q. And you are the husband of Mrs. Crandall?

A. That is right.

(Testimony of Merton L. Crandall.)

Q. Were you with your wife on the 11th of February, 1946, Mr. Crandall, when she went to the Newberry Store?

A. I was not with her at that time.

Q. Where were you at that time?

A. I was at the San Carlos Hotel in the lobby waiting for her to get through with her shopping.

Q. How long had you been in Phoenix prior to that time?

A. That was the third day here. We came here on the 8th.

Q. Had you ever been in Phoenix prior to [27] that time?

A. No, sir.

Q. What was the occasion for your coming to Phoenix, Mr. Crandall?

A. On the recommendation of my physician at home in Hudson.

Q. Had you been ill?           A. Yes, I had.

Q. What is your occupation, Mr. Crandall?

A. Well, I am retired at the present time.

Q. What was your occupation prior to the time you were retired?

A. I was a mechanical engineer.

Q. How long have you been an engineer?

A. Oh, approximately 26 or 25 years. I wouldn't know exactly.

Q. In the course of your work as an engineer, Mr. Crandall, have you had occasion at any time to work with various types of metals?

A. I worked on practically all types of metals.

(Testimony of Merton L. Crandall.)

Q. Over how long a period?

A. Well, on my engineering and educational period, training.

Q. In other words, during this entire period you worked with various types of metals?

A. Yes, I would say so, but I have been in [28] production work, working for factories and manufacturing concerns practically all my life.

Q. Are you very familiar with various types of metals?

A. Well, to a certain extent. I am not a metallurgist or a chemical engineer, but I have always worked in metals. That has to do with mechanical engineering, of course.

Q. On February 11th, 1946, were you informed of an accident which your wife had had?

A. Yes, I was.

Q. In response to that information, did you go to the Newberry Store?

A. I did, yes, sir.

Q. Are you familiar, Mr. Crandall, with the condition of the doorway on the—with what the condition of the doorway on the First Avenue side of the Newberry Store was on February 11, 1946?

A. I am familiar with it. If that is First Avenue, but I am not acquainted very well with the street, but I suppose that is the one.

Q. Can you describe—oh, go ahead.

A. It is the rear door.

Q. Can you describe the condition of that doorway at that time?

(Testimony of Merton L. Crandall.)

A. Well, the door is set back from the sidewalk [29] approximately two feet, I wouldn't know exactly, and then there is a threshold where the door is located. That threshold is made up of three metal sections, being anchored there with screws, and there were some pieces chipped out of that threshold.

Mr. Linton: Your Honor, I'd like to make an examination on voir dire.

Q. What time of day was it you made that examination?

A. What time of the day? Well, I wouldn't know what time of the day I made it.

Q. Was it before or after your wife had the accident?

A. Well, it was after she had the accident. I would have no reason to look at it otherwise.

Mr. Langerman: Q. The only time you visited that store on that day was immediately after the accident, was it not? A. That is right.

Q. When your wife went to the hospital immediately after the accident, you went with her, did you not? A. I did.

Q. Will you continue now with your description of the condition of that threshold? [30]

A. Well, there were some corners chipped out of some of those plates where they were joined together, and the ends where they come right up should be flush all the way like one solid piece, that is the object of making it in three sections, of course, when they put them down there, they are

(Testimony of Merton L. Crandall.)

supposed to match them up perfect without any steps. I mean by that, the two ends won't match. In other words, they are cocked like that, (illustrating), and then the corners stuck up and those plates aren't even, and those had been kicked and walked on, and so forth, until they are chipped off.

Q. Did you examine the chips very carefully, Mr. Crandall?

A. Well, the chips were gone, I didn't see them, but the holes were still there.

Q. I mean the holes which you have just described, did you look at those?

A. Sure, yes, sir.

Q. Were you able to tell from that examination and from your experience with various types of metals whether those chips were of a recent origin or old origin?      A. They are—

Mr. Linton: Your Honor, I object to this. I [31] don't know what type of metal it is. If he is trying to qualify him as an expert and trying to talk about the type of metal, as an expert witness, I think there should be some foundation laid as to what type of metal it is.

The Court: I don't know.

The Witness: I don't know how a person would be able to tell the type of material. It is a casting of some kind. It looks like cast iron. That is what it looks like.

Mr. Langerman: Q. Were you able to state from

(Testimony of Merton L. Crandall.)

your examination of that—will you read that question to him?

(The question reading, “Were you able to tell from that examination and from your experience with various types of metals whether those chips were of a recent origin or an old origin,” was read by the reporter).

A. It was of old origin.

Mr. Langerman: Q. How were you able to determine that, Mr. Crandall?

A. Any metal that is broken out that is of recent origin, it has what we call a bright surface.

Q. Bright surface?

A. Bright—b-r-i-g-h-t, and after that metal stands for several weeks or months, the moisture in the air will make it oxidize, turn first a kind of rusty color. It will be that way for quite a long time, and then it keeps getting darker, darker and darker, and there was absolutely no bright surface on that metal.

Q. What was the color?

A. It was very dark. I wouldn't say what color, but it was a dark color.

Q. Will you describe again, Mr. Crandall, the joinder of the various pieces of metal? Will you amplify that further for the Court?

A. Well—

Q. Are you able to illustrate that at all to the jury by taking various objects and joining them together?



(Testimony of Merton L. Crandall.)

A. Well, I will say this. You have two surfaces. Now, that threshold, it is not exactly a crown, but it is a little high. It was high in the center, and then it curves out, which is proper construction—

Q. If we would get you two books or two objects—

The Court: Could you make a drawing on the blackboard.

A. I think so.

The Court: I don't understand that myself. I don't know whether the jury does. [33]

A. In other words, I could make—I will make an end view of that, as near as I can. Say that is the floor and that is the threshold, it has got a little step on it; that is, it is a little—probably three-eighths of an inch high. Now, the center is probably three-quarters of an inch. Now, if you would go and lay another piece right up against that, it should be exactly the same, the same contour.

Mr. Langerman: Q. By "exactly the same", Mr. Crandall, you mean the same height?

A. The same height and everything, this height and the length and this curve and the radius should be exactly the same, which, no doubt, is what it was originally, but when it was constructed, in as much as being like that, this next piece set like this—I am exaggerating it a little so you can see it—like that, (demonstrating). This is quite evident that that metal is higher, it was not set the way it should be, and I think now, because—I would say that the reason that is broken out of there would be on ac-



(Testimony of Merton L. Crandall.)

count of the constant traffic over it, people and the public traveling over it and kicked it and kicked it, and eventually that corner has been taken out of there, it has been broken out. There is three places like that in [34] that doorway on that threshold.

Q. Where are those three places?

A. Well, in plain view; this is inside of the store.

Q. You have drawn three pieces, Mr. Crandall. Do you mean to indicate there is three pieces of metal?

A. There is three pieces of metal in that threshold, and this center one is longer than the two end ones. There is a piece broken out right here at that corner, and there is a piece broken out of this one. That is a big one, and another one broken out of here (indicating). That is the way it looks and that is the way it has been.

Q. You say that is the way it looks, Mr. Crandall, is that the way the ledge now looks today?

A. Well, I don't suppose it has changed very much. I looked at it again since I have been here, and it looks to me as though some of these are a little larger than they were before.

Q. There are no new broken places in it?

A. No, sir.

Q. And that is the only change in the present condition of that ledge from what it was on the day of the accident?

A. Yes, sir. I might say that this threshold has

(Testimony of Merton L. Crandall.)

little bitty corrugations in it, about an eighth of an inch wide, but that is a good design. It is supposed to make the thing more safe.

Q. Mr. Crandall, does this ledge *to up and down* like a step, or is it curved?

A. Well, it is practically the way I have it shown right here (indicating on blackboard).

Q. You mean it curves?

A. Well, yes, it curves. There is a raise like this, but there is a step on each side there that anyone could get or catch their toe or heel on it even though it is brand new. Maybe it is all right to set it that way, I don't know. If I was designing it, I would have this pinned down where the radius would be on the floor level instead of a little rise there.

Q. Is the threshold in the form of what you would refer to as a crown?

A. Yes, I'd call it a crown threshold.

Q. What does that mean?

A. Well, "crown" means it has a rise on it; not necessarily a rise, but it has a crown so that the center of it is higher than the—

Q. Mr. Crandall, does that threshold, other than the fact that it is metal, differ in appearance very much from the normal threshold of a doorway building; is it the same? [36]

A. Well, it is approximately the same contour.

Q. And it is a curved sort of affair?

A. That is right.

Q. But this one is metal?

A. Yes, sir.

(Testimony of Merton L. Crandall.)

Q. Now, Mr. Crandall, were the three pieces of metal joined together in a smooth, flush manner?

A. Sir?

Q. Were the three pieces of metal that formed that ledge joined together in a smooth, flush manner?

A. No, sir; they were not.

Q. How were they joined together? You see, Mr. Crandall, it is a little hard to tell on that drawing, because there are—there is no depth to that drawing, and that is why I suggested you use something that has depth to it, to illustrate what you mean by the statement they were not smooth and flush.

A. Well, if I had a book or a couple of pieces of wood here I could tell you.

Q. Would these objects help you, Mr. Crandall, in illustrating (handing books to the witness)?

A. Yes, I think so. I might say this, that this is the way they are supposed to be. You are supposed to have— [37]

Q. In other words, they are supposed to be smooth?

A. They are all supposed to be like that, you see, all smooth and match up. Instead of that, this, well, say this piece has dropped down like that, which leaves a shoulder, and they don't match up, and that makes this point stick up higher up here. That is the way that is. These high corners here have been kicked and walked on until, I'd say in our terms, have crystallized, and these chunks have broken right out, and where those are

(Testimony of Merton L. Crandall.)

broken off—that depth here is about an inch and a half or an inch and three quarters. One of them, in fact, is two and three-eighths inches deep. That depth there is from one-half to three-quarters of an inch deep where those corners are broken out. It is not a very safe construction to have it in like that.

Q. Now, from time to time in giving this description, Mr. Crandall, you have referred to “safe construction.” Are any or all of the defects that you have described defects in the construction of this ledge, or are they defects which resulted from factors other than the manner in which they were constructed?

A. I don’t know as I just quite understand your question.

Q. You have described, Mr. Crandall, at least two types of defects in that particular ledge. You have described certain chipped out places and you have described the failure of the various pieces to be smooth and even. Now, are those particular defects, or either of them, defects in the construction of that ledge, or are they caused by some other factor? Which, if either of them, are defects in constructed? [38]

A. I would say it was the assembly of them.

Q. The assembly of them?           A. Yes, sir.

Q. Would those defects, both the chipped out places and the uneven fittings, been caused by way of that assembly?

(Testimony of Merton L. Crandall.)

A. No, the uneven fittings caused the corners to chip out.

Q. Those uneven fittings, you would say, were in there from the time the article was assembled, whenever that was?      A. Yes, sir.

Q. Mr. Crandall, it has been now over two years since the accident in question, has it not?

A. Yes, sir; it has been over two years. [39]

Q. How are you now able to remember when you first examined that particular ledge?

A. Well, I examined it that very day, just as soon as—I won't state when, but I examined it the very day of the accident.

Q. Have you had your deposition taken in this case, Mr. Crandall?

A. Yes, I had my deposition taken.

Q. At the time of that deposition were you asked whether you had examined the ledge on that door?

A. Yes, but I was so confused and nervous, because I had never been up against—

Mr. Divelbess: I don't know the object of this line of testimony, but it seems to me he is anticipating some matter here. It seems to me it is objectionable.

The Court: Yes. We might not even hear about the deposition. He may explain it when the time comes, if necessary.

Mr. Langerman: Q. What happened, Mr. Crandall, after your wife was taken to the hospital; did you go there with her?      A. Yes, I did.

(Testimony of Merton L. Crandall.)

Q. And when she had left there did you leave the hospital?

A. No, I stayed there at the hospital. [40]

Q. What was the reason for your staying at the hospital?

A. Well, I was just getting over pleural pneumonia and I was not able to get up and move around and find a place. I was a perfect stranger here. Neither of us had ever been here before.

Q. Were you able to take care of yourself at that time? A. Well, not too much.

Q. Had anyone been taking care of you prior to this accident?

A. No, Mrs. Crandall had been taking care of me.

Q. For how long a period had that been going on?

A. Well, from the first of September—last August or the first of September.

Q. Prior to the first of September was anyone taking care of you?

A. Well, after I had pleural pneumonia I was in the hospital with it for two weeks and then I was taken home and Mrs. Crandall took care of me until then, until I could get up to where I could travel, and the doctor said—the doctor advised me to try the Phoenix, Arizona, climate.

Q. And you then entered the hospital on the same day your wife did? A. Yes, sir. [41]

Q. And you became a patient there?

A. That is right.



(Testimony of Merton L. Crandall.)

Q. And you had not been a hospital patient prior to that time subsequent to the previous September, is that right?      A. That is right.

Q. How long did you remain in the hospital?

A. Eleven weeks.

Q. You remained the same amount of time as your wife?      A. That is right.

Q. As a result of the injuries which your wife suffered, Mr. Crandall, did you incur certain medical and hospital expenses?

A. Yes, during the time—yes, when I was there.

Q. Who was your wife's doctor while she was in the hospital?      A. Dr. Cohen.

Q. Were you also being visited by any physician while you were in the hospital?

A. Yes, Dr. Cohen.

Q. Mr. Crandall, I hand you this paper. Will you tell the Court what it is?

A. St. Monica's Hospital Health Center, Inc., Phoenix, Arizona. It is a statement—South Fifth Avenue. [42]

Q. A statement for services rendered?

A. To Etta Crandall.

Q. Etta Crandall, that is your wife, the plaintiff in this case?      A. Yes.

Q. And what amount is that?      A. \$697.55.

Q. And did you pay that bill, Mr. Crandall?

A. Yes, sir.

Mr. Langerman: I'd like to have this marked for identification.



(Testimony of Merton L. Crandall.)

(The document was marked as Plaintiffs' Exhibit No. 1 for identification.)

Mr. Langerman: I offer this in evidence, your Honor.

The Court: Have you seen this, Mr. Linton?

Mr. Linton: Let me see it.

Mr. Langerman: I believe he has a copy of it, your Honor, although he may not have seen this. Will you mark this, please?

(The document was marked as Plaintiffs' Exhibit No. 2 for identification.)

The Court: It may be received.

(Thereupon Plaintiffs' Exhibit 1 for identification was received in evidence.)

Mr. Langerman: I hand you Plaintiffs' Exhibit 2 for the purpose of identification, and ask you what that is, Mr. Crandall. [43]

A. It is a statement from the St. Monica's Hospital Health Center, Inc., 120 South Fifth Avenue, Phoenix, Arizona.

Q. What is that statement for?

A. For services rendered Merton L. Crandall.

Q. And what is the amount of that statement?

A. \$476.05.

Q. And has this amount been paid by you?

A. Yes, sir.

Mr. Linton: No objection.

Mr. Langerman: We offer this in evidence, your Honor.

The Court: All right, it may be received.

(Testimony of Merton L. Crandall.)

(The document was received as Plaintiffs' Exhibit 2 in evidence.)

Mr. Langerman: Q. In addition to the hospital bills in question, were there certain ambulance bills? A. Yes, sir; there were.

Q. And what were those?

A. Well, we had Mrs. Crandall taken to the hospital, the St. Monica's Hospital in Phoenix. I think that was \$7.50, and then we took her from the hospital to return to the train, and it cost \$10 for the ambulance, and when we got in Chicago we had the ambulance come for us from Hudson, and that was \$50.

Mr. Langerman: Will you mark this?

(The documents were marked as Plaintiffs' Exhibits 3 and 4 for identification.)

Mr. Langerman: Q. I hand you Plaintiffs' Exhibit 3 for identification, and ask you what that is, Mr. Crandall.

A. That was the statement from the people that took us to the hospital in an ambulance from the Newberry Store.

Q. What amount is that? A. \$7.50.

Q. That is the first ambulance that you referred to? A. That is the first one, yes, sir.

Mr. Langerman: I'd like to offer this in evidence, your Honor.

(The document was received as Plaintiffs' Exhibit 3 in evidence.)

Mr. Langerman: Q. I hand you Plaintiffs'

(Testimony of Merton L. Crandall.)

Exhibit 4 for identification, and ask you what that is.

A. Well, that is the \$10 that we paid for the ambulance to take her from the St. Monica's Hospital to the train here in Phoenix. [45]

Mr. Langerman: I'd like to offer this in evidence, your Honor.

(The document was marked Plaintiffs' Exhibit 4 in evidence.)

Mr. Langerman: Q. Do you have any receipt for the \$50 ambulance?

A. I didn't get a receipt for that because it was late in the evening when we arrived and I asked him how much the bill was, and he said \$50, and I paid him the cash.

Q. Each of those other items, Mr. Crandall, you have actually paid, is that right?

A. Yes, sir; they are all paid.

Q. In addition to the items already enumerated, do you have certain expenditures for nurses, private nurses to which your wife referred earlier?

A. Yes, we had to have a private nurse in the hospital on the advice of our doctor.

Mr. Langerman: Mark this.

(The document was marked as Plaintiffs' Exhibit 5 for identification.)

Mr. Langerman: Q. These are cancelled checks for the nurse. I hand you Plaintiffs' Exhibit 5 for identification, and ask you what these are?

A. Well, those are checks that I gave to the nurse, the special nurse that we had in the hospital.

(Testimony of Merton L. Crandall.)

Q. Was there only one nurse, Mr. Crandall?

A. We had just one special nurse and she had to be out for two weeks, and there was another nurse, I don't remember if it was two weeks or not, but she was gone for a period of time and she had a substitute.

Q. At any event, Mr. Crandall, all of those checks represent the payment made by you to this one nurse?      A. That is right.

Q. And this nurse is the nurse that attended your wife?      A. That is right.

Q. And these are what amounts, Mr. Crandall?

A. Well, this is \$56, \$48, \$56, \$56, \$56, \$56, \$40, \$16.

Mr. Langerman: I'd like to offer this in evidence, your Honor.

The Court: Very well.

(The documents were received as Plaintiffs' Exhibit 5 in evidence.)

Mr. Langerman: Q. In addition to the nurse whose payments are covered by those checks, Mr. Crandall, there were other nurses? [47]

A. Well, we had to have a nurse go with us when we went home.

Q. How much time did she spend with you?

A. Four weeks.

Q. And how much pay, did she receive?

A. Well, I paid her \$25 a week, and I gave her—

Q. For four weeks?      A. For four weeks.

Q. A total of \$100?

(Testimony of Merton L. Crandall.)

A. Yes, sir; and she had me give her board and room.

Q. You paid for her board and room?

A. I paid her carfare from here to Chicago and also the ambulance from Chicago home.

Q. How much did her carfare from here to Chicago cost you?

A. Well, I don't remember what the fare was from here to Chicago, sir.

Q. Do you remember approximately what it was—how did you go?

A. We went by train.

Q. And how did you travel on that train?

A. We went in a—

Q. You went how, Mr. Crandall?

A. Three room, or a three room compartment, Pullman. [48]

Q. Can you estimate approximately how much, to the best of your recollection, how much did that nurse's train fare cost you, Mr. Crandall?

A. It would be carfare from here to Chicago. Of course, we had our return tickets, and, of course, I had to turn those in.

Q. I am not referring now to the amount you spent for your own fare or your wife's, Mr. Crandall, I am referring to the amount spent for the nurse.

A. Well, I'd say it would be around \$65.

Q. Did you buy her meals for her on the train?

A. Yes, sir.

(Testimony of Merton L. Crandall.)

Q. Over how long a period was that?

A. Sir?

Q. How long a period did you take, approximately?

A. Well, I'd say approximately two days and two nights.

Q. In addition to the money spent for the nurse in taking her back and the amount spent at your home, and in addition to the amounts represented by these cancelled checks, were there some other moneys spent for nurses for your wife? You mentioned, I believe, Mr. Crandall—

Mr. Linton: I object, your Honor, trying to lead the witness. Let the witness answer the question.

Mr. Langerman: I withdraw that question.

Q. You mentioned, Mr. Crandall, that for a period of time the nurse whose name is on these cancelled checks was out and was replaced by another nurse?

A. That is right.

Q. Did you make any payments to that nurse?

A. I gave her a check for it, I believe. The possible amount of that I just can't recall.

Q. Do you know the amount—

A. I would say—pardon me—but I believe her check is in that other bundle of checks, the one that took her place. I think it is the last one in there.

Q. Did you make payment to her?

A. I paid her the same rate that I paid the other nurse. I think it was for two weeks.

Q. What was that rate?



(Testimony of Merton L. Crandall.)

A. I paid this nurse \$56 a week.

Q. \$56 a week, and you had this nurse for two weeks?

A. That is right.

Q. Now, in addition to the items already listed, Mr. Crandall, did you have certain medical, doctor's expenses?

A. Yes, sir. [50]

(Thereupon a document was marked Plaintiffs' Exhibit 6 for identification.)

Mr. Langerman: Q. I hand you Plaintiffs' Exhibit 6 for identification, and ask you what those are.

A. Well, those are checks that I issued to Dr. Cohen.

Q. In payment for medical services rendered to you and your wife?

A. That is right.

Mr. Linton: I didn't get that last answer.

(The last question and answer were read by the reporter.)

Mr. Linton: I object to that, your Honor. I believe that the medical services should be confined to Mrs. Crandall and not the medical services paid for Mr. and Mrs. Crandall.

The Court: The objection is sustained.

Mr. Langerman: Q. Do you know which of these checks represents the fee for the services rendered Mrs. Crandall, or what amount of those checks?

A. Yes, I know what they are.

Q. Will you tell that to the Court?

A. Well, the check for \$286 was for Mrs. Crandall and the \$100 was a check for myself. [51]

Mr. Linton: Your Honor, I still make the same

(Testimony of Merton L. Crandall.)

objection. The checks for Mr. Crandall, for medical expenses, should not be permitted here.

The Court: Well, I agree with you.

Mr. Langerman: Can we split those up, your Honor, and offer the other ones in evidence?

The Court: All right.

(Thereupon check for Mrs. Crandall in the sum of \$286 was marked as Plaintiffs' Exhibit 6-a in evidence.)

Mr. Langerman: Q. In addition to the fee paid to Dr. Cohen, has your wife, since the time of this accident, secured the services of any other physician as a result of her injuries received in this accident?

A. Well, we had our physician at home check her up twice after we arrived home.

Q. What charge, if any, did he make?

A. His cost was \$3.50.

Q. There were two of those?

A. That is right.

Q. Has there been any other doctor or medical bills?

A. Well, she has had to go to a chiropodist.

Q. How often has she had to do that?

A. On account of her leg being short, it affects her feet, and so forth. Well, I would say about every six or eight weeks.

Q. And what amounts, if any, have you expended in payment to the chiropodist?

A. Well, in the original—it was five dollars, and altogether I would say that probably \$40.

(Testimony of Merton L. Crandall.)

Q. In other words, the total—

A. \$45 total.

Mr. Langerman: The total is approximately \$45.

The Court: We will suspend at this time until 2:00 o'clock. Keep in mind the Court's admonition.

(A recess was thereupon taken.)

2:00 o'clock, P. M. April 6, 1948.

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

MERTON L. CRANDALL

resumed the witness stand and testified further as follows:

Mr. Langerman: The defense may cross examine now. [53]

Cross Examination

Mr. Linton:

Q. Mr. Crandall, how soon after your wife went to the St. Monica's Hospital did you go over—did you go to the St. Monica's Hospital in the ambulance with your wife? A. I did, yes, sir.

Q. How long were you there, Mr. Crandall?

A. I was there 11 weeks.

Q. And were you a bed patient there?

A. No, sir, I was not a bed patient entirely.

Q. Pardon? A. I was not entirely, no.

Q. How long was it that you were there before you were able to get out of bed and walk around?

A. Well, I was what they call a floor patient

(Testimony of Merton L. Crandall.)

practically all the time I was in there. I was able to be up.

Q. And did you remain at the hospital premises all the time Mrs. Crandall was there?

A. Yes, sir.

Q. Did you at any time leave the hospital premises while you were there? A. Yes, sir.

Q. And when was the first occasion that you left the hospital grounds? [54]

A. Well, I wouldn't know, I don't remember.

Q. Well, was it approximately eight weeks?

A. Well, it is hard to tell, sir. I wouldn't know when it was. I didn't try to keep any record of that.

Q. Mr. Crandall, you recall on January 29th, 1948, at one o'clock on Thursday of that week that you went to an address at 714 South Hill Street, Los Angeles, California, at which time you were under oath and gave a deposition to an attorney by the name of George R. Haswell?

A. Yes, sir.

Q. And you recall that was pursuant to a stipulation between Mr. Langerman and myself that you gave that deposition? A. Yes, sir.

Q. And in that deposition, I will ask you if you recall this question, on Page 26, beginning with Line 21: "Question: Approximately how long was it before you started going out, to the best of your recollection?" And your answer—"Well, I would say it was close to eight weeks." Is that correct?

(Testimony of Merton L. Crandall.)

A. Well, I suppose, probably, that is approximately correct, yes, sir.

Q. In other words, up until eight weeks—[55] in other words, from the time immediately following the accident until you first left the hospital grounds, it was probably eight weeks?

A. I would say that is right, after I went to the hospital.

Q. In other words, that would be around the first part of April, 1946?      A. Yes, sir.

Q. Up until the first part of April, 1946, you stayed in the hospital and the hospital premises?

A. All the time, that is right.

Q. About what percentage of the time did you stay in bed?

A. Well, I spent quite a lot of time in bed. I was up and down. I don't know, but I spent quite a lot of time there because that is where I thought I should be.

Q. In other words, I believe after you got to the hospital you were ill and apparently had to have medical attention?

A. Well, I had been getting it at home and I was getting it there too some when it was necessary.

Q. In looking over Plaintiffs' Exhibit 2, the bill that you received from the St. Monica's Hospital, I find that there are such items as this: G.I. Series, \$25; G.I. Check, \$15; Routine, \$5; [56] C.B.C., \$3.50, and drugs, \$41.55. Do you recall those items and those checks or examinations?

(Testimony of Merton L. Crandall.)

A. Well, were those for me personally, you mean?

Q. Well, I will show you this for your convenience, Mr. Crandall, (handing document to witness). On this statement there are five items other than the room. A. Oh, I see.

Q. G.I. Series, \$25; G.I. Check, \$15; Routine, \$5; C.B.C., \$3.50, and drugs, \$41.55.

A. Well, I can remember paying those, but I would say yes.

Q. In other words, those were caused by your own illness? A. Yes, that is correct.

Q. In other words, then the only items on there as to your hospitalization was the item of 64 days at \$5, and 12 days at \$5.50?

A. Yes, that would be right.

Q. Now, Mr. Crandall, did you become sick to where you needed medical attention shortly after you went to the hospital?

A. Well, it was some of that, yes, I did, yes, while I was in the hospital.

Q. And you were treated by doctors other than Dr. Cohen also, were you not? [57]

A. That is right.

Q. In other words, for the first several weeks there you were really a bed patient, were you not?

A. Well, no, I would say not because I was what they call a floor patient, walking patient.

Q. You were receiving medical treatment?

A. Yes, that is true.

Q. Now, I believe you said you had been in



(Testimony of Merton L. Crandall.)

Phoenix for a period of approximately three days before February 11th?      A. That is correct.

Q. And that you stayed at the San Carlos Hotel at that time?      A. No, sir; we were in a motel.

Q. Do you remember the name of the motel?

A. The Rose Bowl, we stayed the first night and that is all we could stay, and then we had to move to another one where we could stay three nights, and they said we could go back to the Rose Bowl and stay another night. We stayed the second night, I can't recall the name of it, we were there two nights.

Q. How did you come from your home in Michigan to Phoenix, by car, train or plane?

A. We came by train.

Q. And then you and your wife came out on the [58] train together?      A. Yes, sir.

Q. Did you have a drawing room or a compartment to travel that way?      A. Yes, sir.

Q. Now, do you remember how much you paid for your night's lodging at the Rose Bowl Motor Court?      A. It seems to me it was five dollars.

Q. Five dollars. Then in addition to that you had to pay for meals, of course?

A. That is right, yes, sir.

Q. In other words, this rate at the hospital at \$5 a day where you got your meals was really cheaper than your motor court, wasn't it?

Mr. Langerman: We object, your Honor, it is speculative.

(Testimony of Merton L. Crandall.)

The Court: Well, it is argument, you can argue that to the jury.

Mr. Linton: It will speak for itself. Now, Mr. Crandall, how long were you in the store of the J. J. Newberry Company, the day that your wife fell? A. How long was I in there?

Q. Yes.

A. Well, I was in there just long enough until the ambulance could arrive and got my wife. [59]

Q. In other words, you and your wife went on in the ambulance to the hospital?

A. Yes, sir.

Q. That is, in other words you stayed there for about eight weeks, then?

A. That is right.

Q. Referring to the deposition which I reported to you a few moments ago? A. Yes, sir.

Q. I will ask if you weren't asked this question and gave this answer, on Page 2, the question on Line 14; a question by Haswell: "Mr. Crandall, have you ever had your deposition taken before?" Answer: "I have not." Question: "Just so you will understand the nature of the proceeding, I will tell you this: We are sitting around here rather informally, you have been sworn by the reporter, and your testimony will have the same force and effect as if you were testifying in court. It is not my intention to ask you any trick questions, but merely to find out what you know about the facts of this case. Now, if you should testify differently, the defendants in the case would have

(Testimony of Merton L. Crandall.)

the right to call that to the Court's attention. I mean by 'testifying differently', I mean at the time of trial if you should testify [60] differently. So, if you don't understand a question that I ask, if you will ask me to repeat it, I will be glad to do so. Now, you further understand, do you, Mr. Crandall, that this is being taken by written stipulation signed by your attorneys, is that right? Answer: Yes, I understand." Do you remember that question and that answer? A. Yes, sir.

Q. And referring to the deposition on Page 11, beginning with Line 16: "Question: Now, at that time when you were at the Newberry Store, did anyone tell you where the accident happened? Just answer it yes or no, Mr. Crandall. Answer: No." Do you recall that question and that answer?

A. I don't just exactly recall that question and answer.

Q. Well, I will ask you some more questions, Mr. Crandall: the next question on Line 20. "Question: Did anyone later tell you where the accident happened? Answer: Yes, they did later." Do those refresh your memory as to those two questions and answers?

A. Well, I was—will you please read that question again?

Q. Yes. "Did anyone later tell you where the [61] accident happened? Answer: Yes, they did later."

A. What do you mean by "later?"

Q. Well, I will read—

(Testimony of Merton L. Crandall.)

A. I mean the first question that you asked there, I said I didn't remember. I'd like to have you read that again.

Q. All right, the question on Line 16: "Now, at that time when you were at the Newberry Store, did anyone tell you where the accident happened? Just answer it yes or no, Mr. Crandall. Answer: No."

A. Yes, they did.

Q. Then your answer of "no" at the time of the deposition is incorrect?

A. Yes, sir; it is incorrect because—I will tell you how that—when that question was asked I was just confused and nervous and I just—my mind was foggy and I really couldn't recall. I tried hard to, but after we left there and got through, I talked it over with the Missus and she says, "Well, don't you remember what happened that day, and you talked it over, and so forth, and told me about it, and so forth," and it came to me that I did. I looked that place over when—

Q. That is not the question, Mr. Crandall. In other words, you said that no one on that day, [62] in your deposition, you said no one on that day showed you where the accident happened.

A. Well, they did.

Q. And do you know who it was?

A. No, I don't know who it was, because I wanted to know immediately what happened and where, and I was told, and I went there right then,

(Testimony of Merton L. Crandall.)

at that very moment before the ambulance got there, and I viewed that doorway.

Q. And you left your wife—

A. She was upstairs. They took—carried her upstairs.

Q. I will ask you further questions and answers following on Page 11, Line 26, continuing on Page 12: “Question: Now, on the day that you were there, did you make any examination of the premises? Answer: Well, I took a look at the place where they said she fell.” Do you recall that question and answer?

A. That is what I did. I took a good view of it to see. I couldn't imagine why she had fallen in a place like that. I didn't know what happened, and I went there to take a look at it, yes, sir.

Q. Do you recall the following questions and answers starting on Line 4 of Page 12: “Question: On the first day you were there? Answer: No it [63] couldn't have been the first day. Question: I am speaking now of the time when you went to see Mr. Crandall after they called you on the phone. Answer: No, I didn't take a look at it. Question: You didn't take a look at that time? Answer: No, sir. Question: At that time you were interested in getting Mrs. Crandall to the hospital? Answer: That is what I wanted to do, was get some help for her right then.”

Mr. Langerman: That was not read correctly.

Mr. Linton: What?

Mr. Langerman: Line 13.



(Testimony of Merton L. Crandall.)

Mr. Linton: "Answer: That is what I wanted to do, was get some help for her right then." Is that right?

Mr. Langerman: Yes.

Mr. Linton: "Question: And later you did go back to the store? Answer: Later, I went back and took a look at the place. Question: Now, with reference to February 11th, 1946, when was that? Answer: You mean when I went to look at it? Question: Yes. Answer: I wouldn't know when it was that I went to look at it. Question: And have you looked at it more than once? Answer: Yes. Question: Well, now, the first time you looked at it was that close to the time [64] that Mrs. Crandall went to the hospital? Answer: Well, it was just a few days after. Question: You would say it was a few days afterwards? Answer: I would say that it was, oh, well, within ten days. Question: Within ten days? Answer: I would say it was within ten days. Question: That is your best recollection at this time? Answer: As I can remember it, yes. I took a look at it." Do you remember those questions and those answers, Mr. Crandall?

A. Yes, I do remember some of them.

Q. And do you recall at that time you were giving the deposition you were under oath?

A. Yes, I realized that.

Q. And you have changed your story today?

A. Well, as I say, I was so nervous and confused and they popped questions at me so fast, it is just hard for me to concentrate and know exactly



(Testimony of Merton L. Crandall.)

what to say as I look at it. But—another place there I made the statement that I looked that place over the very day while I was waiting for the ambulance to come, to see what happened, where the trouble was.

Q. Now, at the time this deposition was taken you and your wife were present, and the court reporter, and Mr. Haswell, is that right? [65]

A. Yes, sir.

Q. Just the four of you in the room, and I will ask you if at the same time the following questions were asked and the following answers given on Page 15, beginning with Line 21, referring to the step: “Question: Where is the step? Answer: I wouldn’t say just where that is, but as I remember it, there is a step down there. I believe that it doesn’t slope down like a lot of the doors that are set back. Some of them sloped down to the sidewalk, but I believe that this one comes out, and then there is a step. I don’t believe it slopes all the way to the sidewalk. Question: Now, when you examined this entrance within ten days, the first time you examined it, which you say you believe it was within ten days of the accident— Answer: Yes, I believe it was within ten days of the accident. Question: When you examined that, what did you see, if anything? Answer: Well, there were a couple of holes in the—I would call that a threshold for the door. That is what I would call it. It is a place set in the floor and it is two or three sections, and there were two holes in that

(Testimony of Merton L. Crandall.)

threshold. Question: And where were those two holes? Answer: Well, there was one on each side.

Question: And were they on [66] the inside of the threshold or outside of the threshold? Answer:

They were right on the threshold. Question: You mean they ran all the way across the threshold?

Answer: No, no. One of them looked as though there was a piece broken off of a section. A little piece was broken out of the section of the threshold. And the other hole looked to me, as I remember it, to be a round hole, not deep. It was a shallow hole, but it looked like a hole there for a bolt or something to lock a door, to lock a door. That is what it looked like." Do you remember those questions and those answers?

A. Yes, sir.

Q. And do you remember at that time, on January 29th of this year, you testified that there was a hole that looked like a bolt fitted in and one other hole in threshold?

A. I remember that, yes, sir.

Q. That is all that was present at that time, was it not?

A. That is the way I remembered it.

Q. In other words, Mr. Crandall, what we are trying to get here is which is correct at the time you examined it, either at the time of the accident or ten days later, where were these holes? In this [67] deposition you have referred to the one hole other than the bolt hole, and then in your testimony

(Testimony of Merton L. Crandall.)

you referred to three. At which time is your statement correct?

A. Well, they are correct where I sketched them this morning, that is where they are now.

Q. And then your deposition was not correct?

A. Well, that deposition is—was taken some time, a long time after I looked at that, and it is hard for a person to remember exactly what the picture is.

Q. Mr. Crandall, isn't it true that in December of last year, December, 1947, that you examined the premises?

A. I looked at them then, that is correct.

Q. This deposition was taken in January, 1948?

A. Yes.

Q. Approximately a month later.

A. Yes, sir.

Q. And you had recently viewed the premises just a month before this deposition?

A. Approximately.

Q. Have you gone over this deposition with your attorneys?      A. No, sir.

Q. You never talked to them about it at all? [68]

A. No, I have never been over it.

Q. Now, on page 21, I will ask you if you recall the following questions and answers, beginning on Line 20: "Question: You didn't see anything wrong with that area between the door, the threshold and the sidewalk? Answer: No; no, I

(Testimony of Merton L. Crandall.)

looked at that and it seemed to be perfectly okay.”  
Was that question and answer correct?

A. Yes, sir.

Q. I will ask you this question and answer that we asked you at the deposition, on Page 29, the question on Line 2: “Question: Now, when you examined it in December of 1947, were these holes you have told about still there? Answer: Yes, they are still there. Question: They are still there? Answer: I know one of them was, and I will say that they were both there, yes.” Do you remember that question and that answer?

A. Yes, sir.

Q. In other words, in December, 1947, when you viewed the premises, you only noticed one hole at a place where the door fitted down into the threshold? A. I said two, didn't I?

Q. Well, one hole that you saw was an irregular hole and a hole that set where the door fastened into the threshold? [69]

A. That was my impression at that time, yes, sir.

Q. That was in December, 1947?

A. That is right.

Q. And you examined it at that time?

A. That is right.

Q. And isn't it true that your memory is more likely to be correct in remembering of an occasion for three or four months, than two years and two months?

Mr. Langerman: That is argumentive.

(Testimony of Merton L. Crandall.)

The Court: Yes, that is also argument.

Mr. Linton: Q. I believe you testified on direct examination, Mr. Crandall, that you were in the lobby of the San Carlos Hotel at the time your wife fell? A. That is right.

Q. Mr. Crandall, have you examined the entrance to the J. J. Newberry Company since you have been in Phoenix in this month?

A. Yes, sir.

Q. And when did you make that examination?

A. This morning.

Q. This morning? A. Yes, sir.

Q. And that is the last—the first time you [70] have seen it since December, 1947?

A. Yes, that is right.

Q. And your testimony today is based on what you saw there this morning, is it not?

A. Not necessarily, no, sir.

Mr. Linton: No further questions.

Redirect Examination

Mr. Langerman:

Q. Mr. Crandall, Mr. Linton, among other things, read you a series of questions which I believe started on, covering Page 12 and a part of Page 13, but in any event, ended with this question which he read to you: "That is your best recollection at this time?" And the answer was: "As I can remember it, yes, I took a look at it." Has anything happened since the time of this deposition to refresh your memory or to in any way change

(Testimony of Merton L. Crandall.)

your recollection of the condition of that ledge at the time of the accident?

A. Well, the general appearance has not changed.

Q. That was not the question I asked, Mr. Crandall. I said has anything happened since the time this deposition was taken which would enable you to recall a different picture than the one you recollected at the time this deposition was taken? [71]

A. I don't understand your question.

Q. Well, following this deposition, Mr. Crandall, did your wife, after leaving the place where this deposition was taken, discuss the deposition?

A. Oh, well, surely, yes, we did.

Q. And did you, at one point in that discussion, recall a conversation which you had had with Dr. Cohen?

A. Yes, yes, we did.

Mr. Linton: Your Honor, I am going to object to the leading form of those questions. I don't mind Mr. Crandall testifying, but I'd rather Mr. Langerman ask him the questions.

Mr. Langerman: I was merely trying to refresh his memory. I would be perfectly willing to let him testify what the conversation was, but he obviously was not able to understand what I was driving at.

Q. When did that conversation take place with Dr. Cohen, the one to which I have just referred?

Mr. Divelbess: Just a minute. He didn't testify that he had a conversation with Dr. Cohen.



(Testimony of Merton L. Crandall.)

Mr. Langerman: I believe he testified having had a conversation with Dr. Cohen.

Mr. Divelbess: I think you testified to that, Mr. Langerman. [72]

The Court: Yes, I think so. Why doesn't he just say he was mistaken the first time?

Mr. Langerman: What is that?

The Court: Why doesn't he say he was mistaken when the deposition was taken?

Mr. Langerman: Well, I think he is going to get around to that, your Honor. I just want him to point out what it was.

The Court: Well, whatever it was, something occurred to change his mind. What difference does it make?

Mr. Langerman: I think it is quite important, your Honor.

The Court: Well, then, let him testify to it and not you.

Mr. Langerman: All right. Will you read the last couple of questions?

(The last two questions were read by the reporter).

Mr. Langerman: Q. When did this conversation with Dr. Cohen, do you recall, take place?

A. Well, it was at the time of the accident, right there, when he asked me how it happened, and I told him.

Q. Did you tell him how the accident happened?  
A. Well, yes. [73]

Mr. Linton: Your Honor, I object. I don't think

(Testimony of Merton L. Crandall.)

there is any evidence that Mr. Crandall saw the accident happen. How could he give that testimony?

Mr. Langerman: Q: In the course of that conversation with Dr. Cohen, was any mention made of the condition of the doorway?

Mr. Divelbess: I object to that question as leading.

Mr. Langerman: I am merely leading up to the subject, your Honor.

The Court: That is what he is objecting to.

Mr. Divelbess: That is it.

The Court: Yes, the objection is sustained.

Mr. Langerman: Q. Well, now, amplify further, Mr. Crandall, as to what was the nature of that conversation with Dr. Cohen?

A. The Doctor asked me how it all happened and—

Mr. Linton: Your Honor, I will make the further objection to any explanation by this witness of how something happened that he didn't see.

Mr. Langerman: We are merely trying to establish what he said, not to prove it is the truth, but to prove that on that very day he said something. The defendants can introduce all the evidence they want as to the effect of what he said was or was not [74] true. We are merely trying to establish what was said then on the day of the accident.

Mr. Linton: Your Honor, I think it is immaterial.

Mr. Langerman: I think it is very material

(Testimony of Merton L. Crandall.)

what was established then. They have put into issue in this case when this man first looked at that ledge. I think it is very material that on the day in question he had some conversation relating to that ledge then. I think that is very material. I think the mere fact that he had such a conversation ought to be introducable in evidence, and I am not trying to establish what he said is or is not true.

Mr. Linton: I certainly object to the form of the question, your Honor.

The Court: I don't know. People make statements in depositions and they may be mistaken as to the time and correct it later. All he has to do is say that he made the statement. People make mistakes.

Mr. Langerman: Your Honor, I realize that, but I think the credibility of the witness, as far as the jury is concerned, is greatly affected if they are convinced he was mistaken or he had changed his story. I just want them to know, that is the thing, that he was mistaken. [75]

Mr. Linton: I believe, your Honor, counsel is bringing out entirely new testimony, attempting to bring out entirely new testimony rather than what was brought out before.

The Court: He doesn't know anything about how the accident happened except what somebody told him.

Mr. Langerman: I am asking him about that ledge.

(Testimony of Merton L. Crandall.)

The Court: If you will read the last question and answer, you will find out.

(The question and answer was read by the reporter).

The Court: He doesn't know how the accident happened except what somebody told him.

Mr. Langerman: Q. Mr. Crandall, are you now sure at this time that you first—as to when you first examined that ledge? A. Yes, sir.

Q. When was that?

A. It was the very day that the accident happened.

Q. And how do you know that that is so; how do you know now?

Mr. Linton: I object. A person knows or he doesn't know. How he knows is a mental process. [76]

Mr. Langerman: Q. Has your memory been refreshed on that point, Mr. Crandall, as to when it was that you first examined that ledge?

A. No, no, I know when it was.

Q. At the time this deposition was taken, did you know?

Mr. Divelbess: Oh, I object to this. It is immaterial and has been asked and answered.

Mr. Langerman: It has not been answered. They have very carefully kept him from answering.

The Court: Well, he knew, he was bound to have known if he knew later. He forgot momentarily.

Mr. Langerman: Q. When you testified as to

(Testimony of Merton L. Crandall.)

the condition of the ledge, Mr. Crandall, that testimony was the condition of the ledge at the time of the accident, is that right?      A. Yes, sir.

Q. Your testimony is not a description of what you saw today?      A. No, sir.

The Court: Well, how does what you say today differ from what you said on the 11th of December?

A. Well, the only difference I can say, sir—Judge, is possibly those breaks and holes in there might be larger.

The Court: All right. [77]

A. The general look—the general picture of the thing is the same as it was at that time.

Mr. Langerman: You may have the witness.

Mr. Linton: No questions, your Honor.

The Court: That is all.

(The witness was excused).

Mr. Langerman: Your Honor, we have Dr. Cohen, who is on his way here. Meanwhile, I think we could put Mrs. Crandall back on. We have one or two questions to ask her.

The Court: All right.

---

### ETTA CRANDALL

was recalled as a witness in her own behalf, and having been heretofore duly sworn, testified further as follows:

#### Direct Examination (Resumed)

Mr. Langerman:

Q. Mrs. Crandall, on this day of this accident,

(Testimony of Etta Crandall.)

prior to the time that you reached the doorway of the First Avenue entrance to Newberry's, did anything unusual happen to you.      A. No.

Q. Did you in any way slip or slide or fall prior to the time you reached the doorway?

A. No. [78]

Q. When you reached that doorway, Mrs. Crandall, did you in any way slip or slide?

Mr. Divelbess: I object to the question as leading.

The Court: Yes. You may answer.

A. May I answer?

The Court: Did you slip or slide?

A. I didn't slip or slide, no. My foot struck something, struck something solid, just hurled me right out, my left foot.

Mr. Langerman: Which foot was it?

A. My left.

Q. What happened to your left foot?

A. Well, I just fell, I just struck right against something like an obstruction or something sticking up.

Q. And then your fall, Mrs. Crandall, as I understand it, was not caused by slipping or sliding?

A. Absolutely not.

Mr. Langerman: That is all.

#### Cross Examination

Mr. Linton:

Q: Mrs. Crandall, on direct examination this morning I believe you used the expression that at



(Testimony of Etta Crandall.)

[79] that doorway your left foot felt insecure, did you not?

A. Well, perhaps I did. I don't know now.

Q. Did you further state you didn't know what happened?

A. Well, I know that is what happened. My foot struck something. I couldn't have fallen like that.

Q. Did you see your foot strike anything?

A. Did I what?

Q. Did you see any obstruction?

A. Well, no, I can't say that I saw it that quickly. I felt it.

Mr. Linton: That is all.

Mr. Langerman: That is all.

(The witness was excused).

---

### MATTHEW COHEN

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

#### Direct Examination

Mr. Langerman:

Q. Will you state your name, please?

A. Matthew Cohen.

Q. What is your occupation? [80]

A. Physician and surgeon.

Q. What training, if any, have you had, Doctor Cohen, that would qualify you as a physician and surgeon?

A. Well, the usual training.

Q. What does that consist of?

(Testimony of Matthew Cohen.)

A. Oh, High School.

Q. Did you attend Medical School?

A. Yes, sir; eight years of college and then internship.

Q. Are you licensed to practice in the State of Arizona?      A. Yes, sir.

Q. How long have you practiced in the State of Arizona?      A. About eight years.

Q. Are you acquainted with the plaintiff in this case, Mrs. Etta Crandall?      A. Yes, sir.

Q. Did you attend Mrs. Crandall and take care of the injuries which she sustained on or about February 11th, 1946?      A. Yes, sir.

Q. Prior to that time were you acquainted with either Mr. or Mrs. Crandall.      A. No sir. [81]

Q. Your only acquaintance with them is in connection with the services which you rendered?

A. Yes, sir.

Q. When you examined Mrs. Crandall as of April 11th, what, if anything, ailments or injuries did she have?

A. She had a broken hip, broken left hip.

Q. And what treatment, if any, did you render for that broken hip?

A. We had confined her to bed and inserted a nail or wire through in the ankle to which we could attach some weights to pull the left leg down.

Q. How long was Mrs. Crandall under your care?      A. About two to three months.

Q. What was her condition at the end of that time, Dr. Cohen?

(Testimony of Matthew Cohen.)

A. She was able to get about on crutches.

Q. Was she recovered? No, sir.

Q. Have you since that time examined Mrs. Crandall? A. Yes, sir.

Q. When have you last examined her?

A. She was up to my office yesterday afternoon.

Q. Can you tell the Court what is the present condition of Mrs. Crandall's hip and leg? [82]

A. Well, she has about an inch of shortening in the left lower extremity. She has stiffness in both the left hip and the left knee. She is unable to use her hip properly, turning her leg in or turning it out. She can't flex it, or, in other words, bring her knee up, which is disabling when she goes to climb stairs. I would say she has about, oh,  $33\frac{1}{3}$  per cent permanent total disability of her left lower extremity.

Q. On the occasion when you first saw Mrs. Crandall, do you know how long it was approximately after she had received her injuries?

A. I saw her the same day, I believe.

Q. Was her husband, Mr. Crandall, there too?

A. Yes, sir.

Q. Did you have any conversation with Mr. Crandall?

Mr. Divelbess: I object to that as immaterial. That does not prove any issue in this case at all.

The Court: I don't think it does.

Mr. Langerman: I didn't hear the ruling, your Honor.

The Court: I say, I don't think it does.

Mr. Langerman: Q. Have you had previous ex-

(Testimony of Matthew Cohen.)

perience with the type of injury that Mrs. Crandall had? [83]      A. Yes, sir.

Q From your experience with those injuries, in your opinion, does such an injury result in any pain or suffering?      A. Yes, sir; quite a bit.

Q. From your examination of Mrs. Crandall yesterday, in your opinion, has her recovery been a normal one or abnormal one?

A. I'd classify it as a fair recovery.

Mr. Langerman: You may ask—you may cross examine.

#### Cross Examination

Mr. Linton:

Q. Do you know Mrs. Crandall's age?

A. I don't know it offhand, sir.

Q. Well, at the time of the accident, did you know what her age was, approximately?

A. I believe so.

Q. Would you say it was around 68 to 70?

A. At times it is dangerous to wonder about a woman's age. I believe you are right though.

Q. Did you carry out any leg raising test for her left leg yesterday?      A. Yes, sir.

Q. And did you carry out any with her right leg? [84]      A. Yes, sir.

Q. In other words, a person of her age, Doctor, with the leg raising test, they are not as active as a person 30 years younger?

A. Almost, very little different.

Q. There is some difference?

A. Very little.

Q. In other words, you would expect some dif-

(Testimony of Matthew Cohen.)

ference after that? A. I believe you would.

Mr. Linton: No further questions, your Honor.

Mr. Langerman: May the witness be excused, your Honor?

The Court: That is all.

(The witness was excused).

Mr. Langerman: The plaintiff rests, your Honor. [85]

---

### DEFENDANT'S CASE

Mr. Divelbess: We would like to make a motion at this time, your Honor.

The Court: All right, in the absence of the jury?

Mr. Divelbess: Yes, your Honor.

The Court: All right, (addressing the jury), you will retire from the courtroom and remain out in the corridor for a few minutes. You will answer to the call of the bailiff.

(Thereupon the jury was excused from the courtroom).

Mr. Divelbess: At this time, your Honor, we move the Court to direct a verdict for the defendant upon the ground that there is no evidence that the accident was due to any negligent act or omission of the defendant or its agents, and upon the further ground that there is no evidence of any faulty construction of the doorway that in any way caused the accident. There is no evidence that the defect, if it did exist there, was known to the

defendant, or that it existed for a sufficient length of time to cause the defendant to have notice of it; upon the further ground that the evidence, such as there is, shows that the alleged [86] defect was as obvious to the plaintiff as it was to the defendant, and, therefore, there was no duty upon the part of the defendant to apprise the customers of any condition existing in the doorway, and upon the further ground that there is no definite evidence as to what caused the plaintiff's fall.

I don't know whether your Honor cares for me to go into all the evidence—

The Court: There is enough to take the case to the jury. I shall so rule.

Mr. Divelbess: You will recall the plaintiff said—

The Court: I recall everything that has been said. She said her foot slipped over some obstruction. I think it would be a good idea to send the jury down to look at that.

Mr. Divelbess: We have no objection to that.

The Court: All right.

Mr. Divelbess: Certainly, where there is no definite evidence of what caused the plaintiff to fall, that leaves the matter entirely to conjecture on the part of the jury.

The Court: All right. She said her foot struck something. Now, what did it strike?

Mr. Divelbess: That is it, what did her foot [87] strike?

The Court: There wasn't anything else there.

Mr. Linton: Well, your Honor, I will—



The Court: There is enough to take it to the jury, I am satisfied about that. I don't want to hear any more argument.

Mr. Linton: The Court wishes the jury to view the premises?

The Court: Don't you think it is a pretty good idea? Do you have any objection?

Mr. Linton: We have no objection.

Mr. Langerman: None whatsoever, your Honor.

Mr. Brown: Your Honor please, would the Court have in mind that the jury view the premises before the arguments? It probably would make the argument, such as it is, more intelligent to them.

The Court: I will wait until you are finished with the evidence. It is time for the afternoon recess anyway. We will have a brief recess.

(Thereupon a short recess was taken, after which all parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Linton: Mr. C. C. Huffman. [88]

---

C. C. HUFFMAN

was recalled as a witness, and having been heretofore duly sworn, testified on behalf of the defendant as follows:

Direct Examination

Mr. Linton:

Q. Your name is C. C. Huffman?

A. That is right.

Q. And I believed you testified you have been

(Testimony of C. C. Huffman.)

manager of the Newberry Store for about 14 years?      A. Right.

Q. How long has the Newberry Store been located in its present location?      A. Since '27.

Q. In other words, it was a new building built, though between '27 and the present time?

A. In 1938.

Q. And the present store then was built in '38?

A. Yes, sir.

Q. Were you in the store, Mr. Huffman, at the time of Mrs. Crandall's injuries?

A. I was not.

Q. Did you arrive at the store that day?

A. Yes.

Q. Do you know approximately how long it was after she had fallen? [89]

A. Around 15 or 20 minutes.

Q. Where was Mrs. Crandall at that time when you returned to the store?

A. I believe she was upstairs.

Q. Now, Mr. Huffman, have you had occasion to examine the First Avenue entrance to the Newberry Store many or a few times in the past eight years?

A. I have occasion to examine that every morning when I unlocked the door.

Q. In other words, you opened the store yourself?      A. I opened that particular door.

Q. I will ask you, Mr. Huffman, if at the present time the metal threshold plate that Mr. Cran-

(Testimony of C. C. Huffman.)

dall testified to is in the approximate condition as he testified there with those three chips in?

A. It is at the present time, yes.

Q. And do you know when those three chips first appeared?

A. I noticed it the first time when I returned from my vacation in July, the first part of July, '47.

Q. Last year? A. That is right.

Q. And prior to July of last year, had you at any time noticed any chips in the metal threshold? [90] A. I had not.

Q. And you have seen it every day?

A. That is right.

Q. And did you examine the metal threshold or doorway on the date of the alleged fall, February, 1946? A. No, sir.

Q. Did you examine it particularly thereafter to see whether or not there was any defect in the threshold? A. No, I didn't.

Q. You have seen it how often since then?

A. I have seen it every day.

Q. Prior to returning from your vacation in '47, had you ever noticed one or two chips or any number of chips in the metal threshold?

A. Well, I noticed the chips in July, '47, after returning from my vacation.

Q. Mr. Huffman, do you know what caused those chips to appear?

A. No, I couldn't say definitely unless it was the stress or strain, settling of the building.

(Testimony of C. C. Huffman.)

Mr. Linton: You may cross examine.

Mr. Langerman: We have no questions.

(The witness was excused).

Mr. Linton: Call the witness Joe Scott. [91]

---

JOE SCOTT

was called as a witness on behalf of the defendant,  
and being duly sworn, testified as follows:

Direct Examination

Mr. Linton:

Q. Your name is Joe Scott? A. Yes.

Q. What is your occupation, Mr. Scott?

A. I am an engineer, surveyor.

Q. Are you associated with some engineering  
firm in the City? A. Yes.

Q. What is the name of that firm?

A. Yost & Gardner Engineering.

Q. I believe you are a registered land surveyor?

A. Yes.

Q. I will ask you whether or not, if on March  
13th, 1946, you had occasion to make a survey of  
the First Avenue entrance to the J. J. Newberry  
Company? A. I did.

Q. What did you do at that time when you went  
to that store?

A. Well, we measured all of the entrance there  
in order to make a map showing the condition. [92]

Q. Did you take measurements? A. Yes.

Q. And were those measurements later reduced  
to a drawing? A. Yes, the next day.

(Testimony of Joe Scott.)

Mr. Linton: Please mark this for identification.

(The document was marked as Defendant's Exhibit A for identification).

Mr. Linton: Q. I will show you Defendant's A for identification and ask you if that represents the conditions as you saw them at the building, and the construction as you saw it on March 13th, 1946.

A. Yes, sir.

Mr. Linton: We offer this in evidence, your Honor, as Defendant's Exhibit A for identification.

The Court: Any objection?

Mr. Brown: No objection, your Honor.

(The document was received in evidence as Defendant's Exhibit A).

Mr. Linton: Q. In other words, Mr. Scott, for information here, the scale is one inch to one foot, that is correct? A. That is right.

Q. Mr. Scott, I will ask, so that the jury are better able to understand the drawing here, this area here indicates north, is that right? [93]

A. Correct.

Q. Where is First Avenue in relation to where this arrow is?

A. Well, this is First Avenue over there, (indicating).

Q. In this area in here?

A. That is the sidewalk.

Q. From this heavy line over to the—the edge of the diagram is the sidewalk? A. Yes, sir.

Q. Then this which you have marked "canopy" over the sidewalk, is that the line that extends

(Testimony of Joe Scott.)

over this direction, to here, the one marked "canopy" over the sidewalk and extending east back to the building?      A. That is right.

Q. This symbol here says "canopy", about how wide is it?      A. 12 feet.

Q. And how long?      A. 15.59.

Q. Then this entrance, the blue portion of the diagram, what does that represent?

A. That is granite.

Q. What portion of the step or doorway is that granite? [94]

A. Well, that is the edge of the step.

Q. In other words, just west of the granite is the sidewalk?      A. That is right.

Q. Then how wide is this granite strip here?

A. .79 of a foot.

Q. And then what is this checked area east of the granite?

A. That is tile, one inch square tile.

Q. Do you recall whether it has any particular colors?

A. Yes, it is mostly white with red border.

Q. White with red border?      A. Yes.

Q. Then what is this shaded pencil area in here?      A. Well, that is the metal threshold.

Q. Then east of the metal threshold, what is that?      A. That is the floor of the building.

Q. That is inside of the store?

A. Inside of the store.

Q. Now, according to your drawing, how wide is that metal threshold?



(Testimony of Joe Scott.)

A. .56 of an inch, would be about six and three-quarters inches.

Q. Six and three quarters inches wide. [95]

A. Yes.

Q. The white area inside of the metal threshold, what does that indicate?

A. That represents doors.

Q. In other words, there are two doors?

A. Yes.

Q. How wide is this entrance from your drawing? A. Well, it is five feet and 18 inches.

Q. Five feet wide? A. Yes.

Q. According to your drawing, what is the distance from the west edge of this metal plate to the edge of the step?

A. Two feet, point 22—two feet, two and three-quarters inches.

Q. In other words, about 27 inches from that west edge of the plate to the step down?

A. Yes.

Q. Now, I believe you say you made an examination of the premises on March 26th—March 13th, 1946? A. That is right.

Q. A little over two years ago? A. Yes.

Q. Now, in making these measurements, Mr. Scott, did you have to get down on your hands and knees [96] to make any actual measurements?

A. I did.

Q. And when you made those measurements,

(Testimony of Joe Scott.)

before having this drawing made here, did you observe the condition of the metal threshold?

A. Yes.

Q. And could you describe generally what the condition was, and if there was anything wrong with the metal threshold at that time?

A. There was nothing unusual about it.

Q. Were there any chips of any nature off of the metal part of the threshold?

A. I think not.

Q. And have you examined that metal threshold since March of 1946?

A. Yes.

Q. And are there any chips in it at this time?

A. Yes.

Q. And from the best of your memory, did you see those chips there at the time the drawing, the notes for the drawing, were taken?

A. No.

Q. I will ask you if you have had occasion some time this year, I believe you told me, to make a sketch of the metal threshold itself?

A. Yes. [97]

Q. And do you recall approximately when those notes were taken?

A. Around the first of January.

Q. Of this year?

A. Of this year.

Mr. Linton: I'd like to have this marked for identification.

(The document was marked as Defendant's Exhibit B for identification).

Mr. Linton. Q. I will ask you if Defendant's B for identification was taken from the notes you

(Testimony of Joe Scott.)

made in January, 1948, as to the metal threshold and the condition of it at that time? A. Yes.

Mr. Linton: We offer in evidence Defendant's Exhibit B.

Mr. Brown: No objection.

(The document was received as Defendant's Exhibit B in evidence).

Mr. Linton: Q. Now, Mr. Scott, in this Defendant's B in evidence you have two drawings, I believe. Now, what is this top drawing, what does that represent?

A. That is a cross section of the threshold.

Q. A cross section of the metal plate itself?

A. Yes. [98]

Q. And how—I guess you would say “tall”, or how high is the top of the metal plate from the floor level itself? A. Five-eighths of an inch.

Q. Does the metal plate come down to a point flush with the floor level, or is there any raise at that point? A. There is a slight raise.

Q. About how much is that slight raise there?

A. Around an eight to a quarter of an inch.

Q. An eight to a quarter of an inch rise from the floor level, and that is before the actual curve starts? A. Yes.

Q. In your drawing here you show three spots on this lower part of Defendant's B, three spots on the threshold. Will you describe to the jury what they are?

A. Those represent the breaks that are there now, or at the time this was made.

(Testimony of Joe Scott.)

Q. I believe you have the date on your drawing as January 3d, 1948, is that correct?

A. Yes.

Q. Now, I believe the drawing on the right edge of it shows two chips opposite each other. About how far are those chips from the door jamb itself? [99]

A. They are a foot and four inches.

Q. And then there is a chip in the left drawing, one chip, and what distance is that from the other doorjamb?

A. The same distance.

Q. Is there any chip in the middle section of that plate?

A. No chip.

Q. And in your top drawing here on Defendant's B you show ridges or corrugations, is that what that is in the middle itself?

A. Yes.

Q. Now I will ask you if you have ever seen this type of threshold in other buildings, stores or offices?

A. Yes, I have.

Q. Is that the customary type of metal threshold, is it about the same height of a household threshold?

A. It is.

(Thereupon Defendant's Exhibit B in evidence was handed to the jury).

Mr. Linton: You may cross examine. [100]

Cross Examination

Mr. Brown:

Q. Mr. Scott, are you an employee of Yost & Gardner?

A. Yes, sir.

Q. What were your instructions when you made this sketch now hanging on the blackboard?

(Testimony of Joe Scott.)

A. To get everything in that particular area to show—

Q. Are you through with your answer?

A. Yes.

Q. This sketch is describing the First Avenue entrance of the J. J. Newberry Store in Phoenix, Arizona. Was it your instructions from Yost & Gardner to go out there and make an accurate plat of that entrance? A. That is right.

Q. This plat is a sketch of the entrance with the doors closed, is it not, Mr. Scott?

A. Yes, sir.

Q. What time of day did you make this sketch?

A. Oh, it was in the morning.

Q. Before the store was open? A. No.

Q. The store was open at that time? What led you to make this sketch with the door closed?[101]

A. Well, merely to show the position of the doors over that threshold.

Q. Now, when you made the sketch which the jury is now examining, Defendant's Exhibit B in evidence, you made that with the doors open, did you not? A. Yes.

Q. What were your instructions from Yost & Gardner when you made that sketch, Mr. Scott?

A. To get the condition of the threshold.

Q. Now, when you made this sketch, this Exhibit A in evidence, you were merely taking measurements and designating the difference in metals that went to make up this entrance?

(Testimony of Joe Scott.)

A. Well, not necessarily. We were to get anything that showed up in there.

Q. Now, back to the canopy here. Is that a metal canopy? A. Yes.

Q. That is designed to have an awning hanging from it, the lower edge, is it not? A. Yes.

Q. Was the awning in place at the time you made this sketch?

A. I don't recall, but I believe not. That was in the morning. I think it was up.

Q. Mr. Scott, you, yourself, took these measurements on March 13th, 1946? [102]

A. Yes, sir; with the help of another man.

Q. Since then you have been on numerous survey jobs, have you not, and done considerable work? A. Yes.

Q. Is there anything—has anything happened to refresh your recollection about what you saw on March 13th, 1946? A. No, not particularly.

Q. You just remember the details of this job as a job? A. That is right.

Q. Now, Mr. Scott, referring to Defendant's Exhibit B in evidence, the metal threshold is made up of three distinct sections, is it not?

A. Correct.

Q. There is nothing on this sketch to indicate whether or not those three sections are flush with each other, is there?

A. Well, except as they are shown by the drawing.



(Testimony of Joe Scott.)

Q. Yes, they are shown to butt up against each other by the cross section, but you didn't actually unscrew any of those plates? Your cross section was made by measuring the height of the ridge against the level of the floor? [103]

A. That is right.

Q. Therefore, there is nothing on this drawing to show whether or not any two of those sections were flush with each other? I am speaking only of the drawing, Mr. Scott.

A. Well, I don't quite understand what you mean. It shows it to me that it is there.

Q. All right. Would you now say that on January 3d, 1948, when you made this sketch that those three sections were flush, one with another, and were properly fitted?

A. I think so, within good practice.

Q. You are referring to good engineering practice?

A. Well, good construction practice.

Q. Well, in good construction they would be flush, would they not? A. That is right.

Q. Not to a tolerance of one ten-thousandth of an inch, but to a tolerance of maybe—

A. Sixty-fourth or thirty-second.

Q. Maybe a sixty-fourth. As a rule, a thirty-second of an inch would be a sufficient deviation to put on your sketch, would it not? A thirty-second is a pretty large dimension in engineering?

A. No, not so large, it depends on where it is.

(Testimony of Joe Scott.)

Q. Yes, in close fittings.

A. What the purpose is.

Q. In close fitting, metal deviation of a thirty-second of an inch would be enough to have it indicated on this drawing? A. I don't think so.

Q. At any rate, Mr. Scott, what this drawing specifically shows is the dimensions of the threshold, the dimensions of each section of the threshold, that is right, is it not? A. Yes.

Q. And shows roughly the chips out of the threshold without any specific dimensions except as in comparison with the dimensions of the entire pieces?

A. A chip would be rather hard to dimension.

Q. Yes. Mr. Scott, at the time you went out to make this sketch on January 3d, 1948, you had definite instructions to locate the chips in the threshold? A. That is right.

Mr. Brown: That is all.

Mr. Linton: No further questions.

(The witness was excused.)

---

Mr. Linton: Your Honor, I spoke with counsel for the plaintiffs. There is one witness to be here at ten in the morning, and I thought perhaps you would like to have an early recess. [105]

The Court: Well, under your stipulation that the jury might view the threshold, I think I will let them go this afternoon.

Mr. Linton: It is perfectly all right.

The Court: I will send them down with the

bailiff, and after they have looked this over, they can go on to their homes without returning here. Is that agreeable?

Mr. Linton: Yes, your Honor.

Mr. Langerman: Yes.

The Court: Counsel have stipulated that you may go down and inspect this threshold and view it, the idea being that you would be better able to understand the evidence after you have done this, so you may go down in the custody of the bailiff and counsel will probably go along. You are not to talk to anybody. You probably have all walked through that door thousands of times and never paid any attention to it, and this time you will look at it. You will not discuss the case, as I told you this morning, among yourselves or with anyone else, and you are not to make up your mind on any issue of the case, and after you have gone down and had this view, then you may go on about your business. Report back here tomorrow morning.

Mr. Brown: Your Honor, I request, if the Court please, that the exhibit with respect to the threshold be taken along.

The Court: Oh, they are going to look at the real thing.

Mr. Brown: Very well, sir.

(Thereupon a recess was taken at 3:40 o'clock p.m.) [107]

10:00 o'clock A.M., April 7th, 1948.

All parties as heretofore noted by the Clerk's record being present, the trial resume as follows:

Mr. Linton: Mr. Miller.

## HUGH JOHN MILLER

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

## Direct Examination

Mr. Linton:

Q. Will you state your name, please, sir?

A. Hugh John Miller.

Q. What is your address?

A. 1415 East Garfield, Phoenix.

Q. Mr. Miller, in March of 1946, where were you employed? A. Kunkle Photo Service.

Q. In what capacity?

A. As a commercial photographer.

Q. How long have you been a commercial photographer? A. Approximately eight years.

Q. And how long were you employed by the Kunkle Photo Service? [108]

A. For a period of four to five months.

Q. When did you leave their employ?

A. Oh, April 6th, 1946.

Q. Just about two years ago?

A. Almost that.

Q. After you left their employ did you go in that venture at some other place?

A. Sunland Photo Service.

Q. How long were you there?

A. Oh, approximately a year.

Q. And when did you go over with the Mountain Spring Water Company? A. Last July.

Q. I will ask you whether or not while you were employed by the Kunkle Photo Studios you had

(Testimony of Hugh John Miller.)

occasion to take a photograph of the west entrance to the J. J. Newberry Company Store?

A. That is right.

Q. And do you remember approximately the date that you took that photograph?

A. It was on a Sunday morning and by checking with the studio, the date was the 10th of March.

Q. 1946? A. That is right.

Q. It was Sunday morning?

A. I remember that distinctly. [109]

Q. Do you recall what were your instructions in the taking of the photograph which you were supposed to take?

A. Only the step, photograph the step, the fullest details of the west entrance, the First Avenue entrance.

Mr. Linton: May I have this marked for identification?

(The document was marked as Defendant's Exhibit C for identification.)

Q. I will show you Defendant's C for identification, and ask you if that represents a true picture of the condition of that step and the surrounding area of the west entrance to the J. J. Newberry Company Store as you saw it on March 10th, 1946.

A. That is the same picture, and it is a true condition of the step and area.

Q. And you said that that was taken on a Sunday?

A. Between 7:30 and 8:00 o'clock in the morning.

(Testimony of Hugh John Miller.)

Mr. Linton: We offer this in evidence as Defendant's Exhibit C for identification.

Mr. Brown: No objection.

(The document was marked as Defendant's Exhibit C in evidence.) [110]

Mr. Linton: Q. At the time you took this photograph was the store open? A. No, sir.

Q. Were the doors open? A. No, sir.

Mr. Linton: You may cross examine.

Mr. Brown: We have no questions.

(The witness was excused.)

Mr. Linton: I'd like to recall Mr. Huffman to the stand for one question.

---

### C. C. HUFFMAN

was recalled, and testified further as follows:

#### Redirect Examination

Mr. Linton:

Q. Mr. Huffman, can you describe generally the condition of the light near the inside of the store, near the west entrance to the store?

A. Well, within a radius of about 20 feet there are nine 300 watt lights.

Q. Now, are they in the ceiling?

A. Three of them are in the ceiling, recessed, and three are dropped.

Q. Now, when are those lights turned on, when are they lit? [111]

A. Turned on when we open the store in the morning at 8:00 o'clock.



(Testimony of C. C. Huffman.)

Q. And you do that every day?

A. That is right.

Q. And can you state then that on the date of this accident those lights were burning?

A. I am positive they were.

Q. That is nine 300 watt lights?

A. That is right.

Q. Do you recall whether or not the same lights are in the position now or were yesterday that were in February, 1946?

A. Yes, the same lights.

Mr. Linton: That is all.

Recross Examination

Mr. Brown:

Q. Mr. Huffman, what is your routine for opening the store?

A. I take care of the side door, and my assistant opens the front doors.

Q. What time do you get down ordinarily?

A. What time what?

Q. What time do you get down in the morning?

A. In the morning?

Q. Yes. [112]

A. Usually about a quarter of eight.

Q. You open the door on the First Avenue side and you go in and then you close the door again, don't you?

A. No, I don't, because I go in the employees' entrance.

Q. You go in—is that the entrance we are talk-

(Testimony of C. C. Huffman.)

ing about, at First Avenue, there is another entrance, isn't there?

A. The entrance going up to the office.

Q. Yes, that is not the entrance we are talking about here?      A. No.

Q. And when do you open this side door on First Avenue?      A. At eight o'clock.

Q. And do you open them and fix them back so the public can come back and forth?

A. Yes, sir.

Q. At eight o'clock in the morning?

A. Yes, sir.

Q. Who opens the front door?

A. Mr. Turner.

Q. Are there occasions when you come down late?

A. Not very often. I am always there by eight o'clock. [113]

Mr. Brown: That is all.

Mr. Linton: That is all.

(The witness was excused.)

Mr. Linton: The defendant rests, your Honor.

Mr. Langerman: We sent for a witness. I think we will just ask Mrs. Crandall one or two questions until that witness comes.

---

## PLAINTIFFS' REBUTTAL TESTIMONY

### ETTA CRANDALL

was recalled as a witness in her own behalf in rebuttal, and having been heretofore duly sworn, testified further as follows:

Direct Examination

Mr. Langerman:

Q. Mrs. Crandall, in addition to being examined by doctors who were selected, were you also at any time examined by any doctors on behalf of the J. J. Newberry Company? A. Yes.

Q. And approximately when did that examination take place?

A. Well, it is about the 15th or 16th of December.

Mr. Linton: What year was that? [114]

A. 194—

Mr. Langerman: Who was the doctor?

A. 1947.

Q. 1947? A. That is right.

Q. Who was the doctor?

A. Dr. Norman Ross.

Q. Is he a Phoenix doctor? A. Yes.

Mr. Langerman: That is all.

Cross Examination

Mr. Linton:

Q. Mrs. Crandall, on the date of the accident do you recall what type of shoes you were wearing, generally the type you have now? A. No.

Q. What type of shoes were you wearing on that date? A. It was a walking shoe.

Q. Beg pardon?

A. A walking shoe, laced, with a military heel.

Mr. Linton: All right. That is all.

(Testimony of Etta Crandall.)

Mr. Brown: Our other witness should be here in about five or six minutes, your Honor.

The Court: Well, we will have to take a recess and go over your instructions [115]

Mr. Langerman: All right, sir.

The Court: The Court will stand at recess for a few minutes.

(Thereupon a recess was taken.)

(After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

### ALVIRA MAGNUSSON

was called as a witness in rebuttal on behalf of the plaintiffs, and being first duly sworn, testified as follows:

#### Direct Examination

Mr. Langerman:

Q. Will you state your name, please?

A. Alvira Magnusson.

Q. What is your residence, Mrs. Magnusson?

A. 2018 East Pierce.

Q. In Phoenix?           A. Phoenix.

Q. What is your occupation?

A. Stenographer.

Q. Where are you employed?

A. Fennemore, Craig, Allen & Bledsoe.

Q. Are those the attorneys? [116]

A. Pardon me?

(Testimony of Alvira Magnusson.)

Q. Are those attorneys, Fennemore & Craig?

A. Yes.

Q. Were you at one time employed by Mr. Brown, one of the attorneys for the plaintiffs in this case?

A. Yes, sir.

Q. Was that on a regular or part time basis?

A. On a part time basis.

Q. And were you at the same time also employed by the same firm which now employs you?

A. Not at that particular time, no.

Q. But you did have other employment.

A. Yes.

Q. How long has it been since you have ceased to be an employee of Mr. Brown?

A. Well, I have worked for him part time up until, oh, maybe six months ago.

Q. On March 20th, 1946, did you have occasion to go to Newberry's Store here in Phoenix, Arizona?

A. I believe it was that day, yes, sir.

Q. What was the reason for your making that particular trip?

A. Well, Mr. Brown wished me to go over and examine the entrance and to attempt to find the eye witnesses to the accident. [117]

Q. To what accident do you have reference?

A. To the accident of Mrs. Crandall.

Q. And in response to his instructions, did you go to Newberry's Store on that date?

A. Yes, sir; I did.

(Testimony of Alvira Magnusson.)

Q. And did you examine the entrance to that store?

A. Yes, I examined the entrance on First Avenue.

Q. And did you examine that particular portion of the entrance?

A. Well, I looked it over and I made some notes and made a report at that time.

Q. Have you looked at those notes since the time you first made them?      A. Yes, I did.

Q. Incidentally, when were those notes made by you?

A. Promptly after my return to the office, after having been over to Newberry's.

Q. How recently have you looked at those notes?

A. I looked at them the other day to refresh my memory.

Q. Now, will you tell the Court and jury what you saw when you examined that entrance to the Newberry Store?

A. Well, I noticed on the inner ledge there were two holes. The one to the left was a little bit bigger, and then over where the ridges are joined together, there was a little raised part where it was sort of irregularly joined, and I think it would be very easy for somebody to catch their heel in.

Mr. Divelbess: I move that the last part of that answer be stricken, and the jury instructed to disregard it.

The Court: All right, it may be stricken.

Mr. Langerman: We have no further questions.



(Testimony of Alvira Magnusson.)

Cross Examination

Mr. Linton:

Q. Do you have the notes with you that you made?

A. No, I don't have them with me, but I believe Mr. Brown has them.

(Papers were handed to Mr. Linton by Mr. Brown.)

Mr. Linton: Q. Now, what time of the day was this that you went over there?

A. I believe it was during the afternoon.

Q. And were the doors open or closed?

A. The doors were open.

Q. Can you recall approximately the distance from the threshold to the step, how close was this together?

A. It seems to me it is all in one. There are ridges on the threshold. [119]

Q. Pardon?

A. There are ridges like, sort of metal ridges.

Q. And is that right next to the step?

A. Seems to me it is all in one.

Q. In other words, you step down from the threshold to the sidewalk? A. I believe so.

Q. And you examined that in detail at that time?

A. Well, to the best of my ability. There were people going in and out, you see.

Q. And was there any difference in the color of

(Testimony of Alvira Magnusson.)

the tile, or any colors near the threshold, different from the colors inside of the door?

A. I wouldn't remember that.

Q. You don't recall that?           A. No.

Q. Did you observe whether there were any chips on the outside of the metal threshold at that time?

A. I just noticed the chips on the inner ledge on the inside.

Q. That there were two?           A. Yes, sir.

Q. And what size were they?

A. Well, that is hard to say. One was a little bit larger than the one on the right. [120]

Q. Well, were they two inches or a half inch?

A. Oh, let's see, I would say,—oh, I would be guessing, maybe nearer an inch, the one.

Q. And where were they located in relation to the center of the metal threshold?

A. They were both, it seems to me, on the seam. There are seams on each side joining that.

Q. When was the last time you examined that area?

A. Well, I glanced at it the other morning.

Q. You mean what morning, yesterday morning?

A. Let's see, what is today, Wednesday? I believe it was Monday morning.

Q. At the request of Mr. Brown?

A. No, I don't think he requested me specially to look at it.

(Testimony of Alvira Magnusson.)

Q. He told you he probably would want you for a witness in this case?      A. Oh, yes, definitely.

Mr. Linton: And you checked it then. That is all.

Redirect Examination

Mr. Langerman:

Q. These notes, however, were made on the date indicated here, on March 20th, 1946, were they not?

A. Yes. [121]

Q. And that was immediately after you examined it?      A. Yes, and I returned to the office.

Q. Are you acquainted with the Crandalls?

A. No, I am not.

Mr. Langerman: That is all.

Mr. Linton: That is all.

(The witness was excused.)

---

Mr. Linton: We have no surrebuttal.

The Court: All right, you may proceed with the argument.

Mr. Linton: No surrebuttal, your Honor.

Mr. Divelbess: We wish to renew our motion in the absence of the jury.

The Court: All right.

(Thereupon the jury was excused from the courtroom.)

Mr. Divelbess: The defendant wishes to renew its motion for an instructed verdict, and on the further ground that the alleged defects are so slight as not to constitute negligence as a matter of law.

The Court: The motion is denied. Call the jury.

(Thereupon the jury was recalled and assumed their respective places in the jury box.) [122]

The Court: We will suspend until two o'clock. Keep in mind the Court's admonition.

2:00 o'clock P.M., April 7th, 1948.

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

(Thereupon arguments were presented to the jury by counsel for both sides, after which the Court instructed the jury as follows:)

The Court: It now becomes the Court's duty to instruct you as to the law that applies to this case. Briefly, the issues involved are as follows:

The evidence shows that Mrs. Crandall was attempting to enter the store of the defendant and fell. It is claimed that the defendant was negligent in that said step was not in a safe condition; in that said step had ridges and uneven places in said step; that said step at said time and place was so uneven so as not to afford the plaintiff a sure footing, and as a result of the condition of said step as aforesaid, the plaintiff tripped and fell to the ground; that the unsafe condition of the said doorway and step, as aforesaid, was in existence for a long time prior to the time aforesaid, and was known, or should have been known by the defendant, in that many customers of the defendant had been injured— [123]

Mr. Linton: That was stricken, your Honor.

The Court: That is right.

—that the plaintiff, Etta Crandall's fall was caused by the negligence of the defendant as aforesaid; that as a result thereof, the plaintiff was rendered sick and lame and suffered many bruises and contusions in and about her body, and suffered a fractured hip, and was confined to a hospital and to bed; that said injuries as aforesaid have permanently disabled the plaintiff to her damage in the sum of \$10,000.

The plaintiff, her husband, Merton L. Crandall, also claims damages for the amount of hospitalization and for medical attention that he expended for his wife's cure.

Now, the defendant generally denies the claims of the plaintiff. They deny that the condition of said doorway and step was unsafe and denies each and every, all and singular, the remaining allegations of Paragraph 4 of Plaintiff's complaint. Paragraph 4 is what I have just read to you about the unsafe condition of the step, and in addition, the defendants say that if the plaintiff, Etta Crandall, was injured or damaged, such injuries or damages were caused or contributed to by her own negligence. [124]

Now, I have used the word "negligence" several times, and I will give you the legal definition of it.

You are instructed that negligence is the omission to do something which a reasonably prudent man, guided by those considerations which usually

regulate the conduct of human affairs, would do; or is the doing of something which a prudent and reasonable man would not do. It is not intrinsic or absolute, but is always relative to some circumstances of time, place or person. Negligence is of no consequence unless it was the proximate cause of the injury or damage.

Now, proximate cause of an injury is that cause which, in natural or continuous sequence, unbroken by any effective intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets the other causes in operation.

In determining whether an act was the proximate cause of an injury, the question always is, whether there was an unbroken connection between the wrongful act and the injury, and to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it ought to have been foreseen in the light of the attending circumstances.

By "ordinary care" is meant that degree of care which an ordinarily careful and prudent person would have exercised under the circumstances.

The defendant has plead herein what is known in the law as contributory negligence. You are instructed that any negligence on the part of the plaintiff, Etta Crandall, however slight, which amounted to failure on her part to exercise ordinary care, and which proximately or directly contributed to and caused her fall and injuries result-



ing therefrom, constitutes a complete defense to this action, and if you do believe from the evidence that the plaintiff, Etta Crandall, and the defendant, were both guilty of negligence at the time of her fall, and that the negligence of each proximately and directly contributed in causing the said injuries and the damages complained of, you are not permitted to speculate or inquire as to which of the parties was guilty of the greater negligence, or to determine upon your verdict the result of such injuries, but you are instructed under such circumstances that the law requires you to return a verdict for the defendant. [126]

In order for you to find that the defendant was negligent in the construction or maintenance of the threshold and doorway upon which plaintiff fell, you must first find that the threshold and doorway was dangerous or unsafe for plaintiff's use to the point of involving her to an unreasonable risk, if she were exercising ordinary care. If you find that the threshold and doorway did not subject plaintiff to an unreasonable risk, if she exercised ordinary care, then you will not consider the case further, because the defendant was not guilty of negligence, and you must find for the defendant.

If, however, you find that the threshold and doorway did involve an unreasonable risk to plaintiff, even though she may have been exercising ordinary care, then, in order to hold the defendant liable you must further find that the defendant either had actual knowledge of the unreasonable risk involved, or that such condition had existed

for such a period of time prior to the accident that in the exercise of ordinary care the defendant, its agents or employees, should have recognized it as involving an unreasonable risk to its customers. Therefore, if you find from the evidence that the defendant, its agents or employees, in the exercise of ordinary care in seeing the condition of the threshold and doorway, would not have recognized it as involving an unreasonable risk to the customers, then your verdict must be for the defendant.

The mere fact, however, that the metal threshold was chipped or that the plaintiff tripped on the chipped threshold is no evidence whatever that defendant knew or should have known the threshold was an unreasonable risk to plaintiff. Plaintiff must not only prove the threshold subjected her to an unreasonable risk, but, in addition, she must prove that said dangerous condition was caused from the improper maintenance of the threshold, or that it was out of repair for a sufficient time prior to the accident so that defendant in the exercise of ordinary care should have discovered the threshold involved an unreasonable risk to customers and to have remedied the condition. This is so because a storekeeper is not liable to injuries to his customers for a dangerous condition on his premises where the storekeeper does not have actual knowledge or constructive notice of the danger.

You are further instructed that you are not permitted to guess, speculate or surmise upon whether the defendant was negligent in this case. [128]

You are instructed that the maintenance of a step from the store level to the sidewalk is not negligence, and the plaintiff was under the duty to take notice of the change in levels.

You are instructed that even though you may believe from the evidence that the threshold had chips or other defects in it at the time of Mrs. Crandall's fall, that is not sufficient to entitle plaintiff to recover. In addition, you must find that the chips or other defect in the threshold was such as to involve an unreasonable risk to persons using the doorway in the ordinary care and exercising ordinary care.

Even if you find this to be the case, you must go further and find that the chips or other defect in the threshold were the direct and proximate cause of Mrs. Crandall's fall, since the maintenance of a metal threshold such as this is not of itself negligence.

The legal duty which the defendant owed plaintiff in this case was only to exercise reasonable care to make the threshold and doorway reasonably safe for her use. It was not bound to make the threshold [129] and doorway absolutely safe, but only reasonably so. In order to show want of reasonable care by the defendant, you must find from the evidence that the threshold and doorway at which plaintiff fell was not constructed or was not maintained in a reasonably safe manner and presented an unreasonable risk for plaintiff.

You are instructed that in deciding whether or not the plaintiff, Mrs. Etta Crandall, was guilty of

any negligence which proximately contributed to her injuries, it is proper for you to take into consideration all of the facts and circumstances of the particular case. In this connection, if you find that Mrs. Etta Crandall had never before been on the premises where the accident occurred, and had no knowledge of any defects or chips in the threshold, if any there were on said premises, that she was not bound to exercise as great a degree of care as though she had been aware of the defects or chips on that threshold, if any.

You are instructed that if Mrs. Crandall used the same degree of care for her own safety that a normally prudent and careful person would have used under the same or similar circumstances, that she was not guilty of any contributory negligence.

You are instructed that the owner of a store is liable for harm resulting from dangerous or unsafe conditions in that store or in any portion of those premises over which he has control, even though he had no actual knowledge of these dangerous or unsafe conditions if the conditions could have been discovered by him by reasonable inspection.

The proprietor or the owner of a store is bound to exercise reasonable care to keep his premises reasonably safe as to all portions of the premises over which he has control, whether such portions be within the building or on the outside, and he has the duty of keeping and maintaining this property in a reasonably safe state of repair. He owes this duty to any business invitee. In this connection you are instructed that the term "business

invitee'' includes not only those people who actually enter his place of business and make purchases therein, but also includes all persons who enter his store for the purpose of making purchases whether or not such purchases are actually consummated.

Now, if your verdict should be for the plaintiff, Etta Crandall, if you find that she is entitled to recover, you may award her such damages within the amount claimed in her complaint as in your opinion will compensate her for the pecuniary damages proved to have been sustained by her and proximately caused her by the wrong complained of. [131]

In estimating the amount of such damages, you may consider the physical and mental pain suffered, if any, the nature, extent and severity of her injury or injuries, if any, the extent, degree and character of suffering, mental or physical, if any, its duration and severity, and the loss of time and value thereof.

You may also consider whether the injury was temporary in its nature or is permanent in its character, and from all these elements you will resolve what sum will fairly compensate the plaintiff for the injury sustained.

If you find that the plaintiff is entitled to recover, the measure of her recovery is what is denominated compensatory damages; that is, such sum as will compensate her for the injuries she has sustained.

Now, if you find for the plaintiff Merton L. Crandall, you may award him such sum as he may



have expended for hospitalization and medical expenses which he paid on account of such injuries to his wife, Etta Crandall. [132]

Now, by the giving of that instruction—these two instructions on the measure of damages, you are not to assume from that that the Court says you shall find for either the plaintiff or the defendant. If your finding is for the plaintiff, then you should follow the rule I gave you.

Now, in civil cases a preponderance of the evidence is required, and by a “preponderance of evidence” is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or his motives; or by contradictory evidence. In judging the credibility of the witness in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable persons. You should carefully scrutinize the testimony given, and in so doing, consider all of the circumstances under which any witness has testified, his



demeanor, his manner while on the stand, his intelligence, the relation which he bears to the parties, and the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon the credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should discuss his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness's testimony.

There is nothing peculiarly different in the way a jury is to consider the proof in a civil case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment. [134]

Jurors are expected to agree upon a verdict where they can conscientiously do so. You are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out must be wholly left out of account and disregarded. The

opinion of the Judge as to any issue in the case, if directly or indirectly expressed in these instructions, or any time during the trial, is not binding upon the jury, for to the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these instructions.

After you retire to the jury room you will select one of your number to act as foreman and proceed with your deliberations. After you have agreed upon a verdict, in the event you do, you will have it signed by your foreman and return it into open court. Any verdict agreed upon, of course, must be the unanimous verdict of the jury. You may retire now in the custody of the bailiff. Are there any exceptions to the instructions? [135]

Mr. Linton: The defendant objects to the refusal to give defendant's requested instruction No. 4 as requested by the defendant, and objects to the modification on the grounds that the evidence shows that if the chips were present in the threshold and if their presence constituted negligence, there are other areas in the threshold properly maintained and in good order, and that to refuse this portion of the instruction will be to permit the jury to surmise that if she struck some object even in the proper portion of the threshold, the defendant is liable.

The defendant excepts to the giving of Defendant's Instruction No. 5 on the ground that the instruction is proper under the law, and the evidence in the case.

The defendant excepts to the giving of Defendant's Instruction No. 9 as submitted, for the reason that the evidence shows the threshold was constructed in accordance with the ordinary and customary manner of other and similar thresholds and doorways in the locality, and that the instruction is proper under the law and the evidence in the case.

The Court: The record will note the objections. (Thereupon the jury retired to deliberate on its verdict at 3:10 o'clock, P.M. of the same day.)

---

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 136 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,  
Official Reporter.

[Endorsed]: Filed June 15, 1948.

---

[Endorsed]: No. 11966. United States Circuit Court of Appeals for the Ninth Circuit. J. J. Newberry Company, a corporation, Appellant, vs. Merton L. Crandall and Etta Crandall, his wife, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed July 5, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
For the Ninth Circuit

No. 11966

J. J. NEWBERRY COMPANY, a  
corporation,

Appellant,

vs.

MERTON L. CRANDALL and  
ETTA CRANDALL, his wife,

Appellees.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY AND DES-  
IGNATION OF RECORD FOR PRINTING

J. J. Newberry Company, a corporation, the ap-  
pellant in the above-entitled action, pursuant to  
Subdivision 6 of Rule 19 of the Rules of the above-  
named Court, hereby presents the following state-  
ment of the points on which it intends to rely on  
this appeal:

That the Trial Court erred in denying defend-  
ant's motion for a directed verdict made at the  
conclusion of Plaintiff's case and renewed at the  
conclusion of the entire case, upon the grounds,  
and for the reasons, that there is no evidence that  
the accident and injuries complained of were  
caused by any negligent act or omission of the  
defendant or its agents; there is no evidence of  
any faulty construction that in any way caused or  
contributed to the accident complained of; there

is no evidence of any defect in the threshold that in any way caused the accident complained of; there is no evidence that the defect, if it did exist at the time of the accident complained of, was known to the defendant or that it had existed for a sufficient length of time to cause the defendant to have notice of it; that the alleged defect was as obvious to the plaintiff as it was to the defendant and therefore there was no duty upon the defendant to apprise the plaintiff of the condition existing in the doorway; there is no definite evidence as to what caused the accident and that the alleged defects are so slight as not to constitute negligence as a matter of law.

2. The Trial Court erred in refusing to give defendant's requested Instruction No. 4, as requested, upon the ground that the instruction as submitted correctly stated the law.

3. The Trial Court erred in refusing to give defendant's Instruction No. 5, upon the ground that the instruction was proper under the law and the evidence in the case.

4. The Trial Court erred in refusing to give defendant's Instruction No. 9, upon the ground that the evidence shows the threshold was constructed in accordance with the ordinary and customary manner of other and similar thresholds in the locality and that the instruction was proper under the law and the evidence.

This appellant hereby designates to be printed the whole of the record, including the exhibits and

reporter's transcript forwarded to this Court by the Clerk of the United States District Court, except the following portions of said record:

1. Judgment

2. Minute Entries: (a) Order continuing Motion to Strike, June 16, 1947. (b) Hearing on Motion to Strike, June 23, 1947. (c) Order setting for trial, September 8, 1947. (d) Order resetting case for trial, September 12, 1947. (e) Order resetting case for trial, January 14, 1948

3. Order approving bond on appeal, May 28, 1948

4. Verdict

Dated this 1st day of July, 1948.

GUST, ROSENFELD,  
DIVELBESS, ROBINETTE  
& LINTON

By Harold L. Divelbess,  
Attorneys for Appellant.

Received copy of the foregoing this 1st day of July, 1948.

/s/ BROWN & LANGERMAN  
/s/ By R. Truxal.

[Endorsed]: Filed July 6, 1948. Paul P. O'Brien,  
Clerk.